# 16A Am. Jur. 2d Constitutional Law IX A Refs.

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**Constitutional Law**
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**IX. Fundamental Constitutional Rights and Privileges**

**A. In General**

Topic Summary | Correlation Table

## Research References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 947, 1050 to 1057, 1061 to 1063, 1065, 1067, 4862, 4863

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**End of Document**

# 16A Am. Jur. 2d Constitutional Law § 400

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**IX. Fundamental Constitutional Rights and Privileges**

**A. In General**

## § 400. Nature of fundamental constitutional rights

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 1050 to 1052

A constitutional guarantee of fundamental rights goes to particular rights under the constitution,[1] whether explicit,[2] enumerated,[3] or implied.[4]

The constitutional guarantees and protections afforded by the State and Federal Constitutions represent the highest values of the people,[5] or core constitutional values.[6] The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the constitution, but that responsibility has not been reduced to any formula; history and tradition guide and discipline the courts when identifying interests of persons so fundamental that the state must accord them its respect, but do not set its outer boundaries, thus yielding a method that respects history and learns from it without allowing the past alone to rule the present.[7] Fundamental rights are only those which lie at the heart of the relationship between the individual and a republican form of nationally integrated government, including the expression of ideas, participation in the political process, travel among the states, and privacy with regard to the most intimate and personal aspects of one's life.[8] Generally, only those rights and liberties which are deeply rooted in the nation's history and tradition and implicit in the concept of ordered liberty qualify as fundamental.[9] However, there is no requirement that states recognize as fundamental only those interests so recognized by the United States Supreme Court in its constitutional analysis.[10]

Statutes,[11] rules,[12] and regulations do not confer constitutional rights but may be mandated by the constitution.[13]

Footnotes

1 Kitchen v. Herbert, 961 F. Supp. 2d 1181 (D. Utah 2013), judgment aff'd, 755 F.3d 1193 (10th Cir. 2014); Matter of Naomi B., 435 P.3d 918 (Alaska 2019); San Diego County Water Authority v. Metropolitan Water Dist. of Southern California, 12 Cal. App. 5th 1124, 220 Cal. Rptr. 3d 346 (1st Dist. 2017), as modified on other grounds on denial of reh'g, (July 18, 2017); People v. Conroy, 2019 IL App (2d) 180693, 2019 WL 5884583 (Ill. App. Ct. 2d Dist. 2019); State v. Davis, 580 S.W.3d 26 (Mo. Ct. App. E.D. 2019), reh'g and/or transfer denied, (June 24, 2019) and transfer denied, (Sept. 3, 2019); Best v. Marino, 2017-NMCA-073, 404 P.3d 450, 348 Ed. Law Rep. 1009 (N.M. Ct. App. 2017).

2 Harris v. McRae, 448 U.S. 297, 100 S. Ct. 2671, 65 L. Ed. 2d 784 (1980); Morrissey v. United States, 871 F.3d 1260 (11th Cir. 2017); In re Guardianship, Conservatorship of Durand, 859 N.W.2d 780 (Minn. 2015); Best v. Marino, 2017-NMCA-073, 404 P.3d 450, 348 Ed. Law Rep. 1009 (N.M. Ct. App. 2017).

3 Bridgeville Rifle & Pistol Club, Ltd. v. Small, 176 A.3d 632 (Del. 2017).

4 Harris v. McRae, 448 U.S. 297, 100 S. Ct. 2671, 65 L. Ed. 2d 784 (1980); Morrissey v. United States, 871 F.3d 1260 (11th Cir. 2017); In re Guardianship, Conservatorship of Durand, 859 N.W.2d 780 (Minn. 2015); Best v. Marino, 2017-NMCA-073, 404 P.3d 450, 348 Ed. Law Rep. 1009 (N.M. Ct. App. 2017).

5 GJA v. Oklahoma Dept. of Human Services, 2015 OK CIV APP 32, 347 P.3d 310 (Div. 4 2015).

6 Doe v. Town of Plainfield, 893 N.E.2d 1124 (Ind. Ct. App. 2008).

7 Obergefell v. Hodges, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015).

8 City of Chicago v. Haywood, 2018 IL App (1st) 180003, 428 Ill. Dec. 818, 123 N.E.3d 547 (App. Ct. 1st Dist. 2018).

9 Planned Parenthood of the Heartland v. Reynolds ex rel. State, 915 N.W.2d 206 (Iowa 2018); Ramirez v. State, 557 S.W.3d 717 (Tex. App. Corpus Christi 2018), petition for discretionary review refused, (June 6, 2018) and cert. denied, 139 S. Ct. 799, 202 L. Ed. 2d 572 (2019).

10 Behm v. City of Cedar Rapids, 922 N.W.2d 524 (Iowa 2019).

11 Embody v. Ward, 695 F.3d 577 (6th Cir. 2012); In re A.C., 2016 IL App (1st) 153047, 403 Ill. Dec. 811, 54 N.E.3d 952 (App. Ct. 1st Dist. 2016); Taylor v. Kansas Dept. of Health and Environment, 49 Kan. App. 2d 233, 305 P.3d 729 (2013).

12 Glasper v. State, 914 So. 2d 708 (Miss. 2005).

13 U.S. v. Raya-Vaca, 771 F.3d 1195 (9th Cir. 2014).

End of Document

**16A Am. Jur. 2d Constitutional Law § 401**

**American Jurisprudence, Second Edition** | May 2021 Update

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**IX. Fundamental Constitutional Rights and Privileges**

**A. In General**

# § 401. Waiver of fundamental constitutional rights

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 947

An individual may waive a fundamental constitutional right,[1] provided the waiver is freely given,[2] knowing, intelligent, and voluntary,[3] and provided the interest in enforcing the waiver is not outweighed by a relevant public policy.[4]

Waivers of different constitutional rights meet the standard in different ways.[5] For certain fundamental rights, a defendant must personally make an informed waiver, but for other rights, the waiver may be effected by the action of counsel.[6]

Under the doctrine of unconstitutional conditions,[7] the government cannot condition the receipt of a government benefit on waiver of a constitutionally protected right.[8] The doctrine reflects a limit on the state's ability to coerce waiver of a constitutional right where the state may not impose on that right directly.[9]

An individual cannot waive a constitutional right designed to protect both the individual and the public.[10]



Footnotes

1 Janus v. American Federation of State, County, and Mun. Employees, Council 31, 138 S. Ct. 2448, 201 L. Ed. 2d 924 (2018); People v. Daniels, 3 Cal. 5th 961, 221 Cal. Rptr. 3d 777, 400 P.3d 385 (Cal. 2017); Phillips v. People, 2019 CO 72, 443 P.3d 1016 (Colo. 2019); Terpstra v. State, 138 N.E.3d 278 (Ind. Ct. App. 2019); Moore v. State, 287 So. 3d 189 (Miss. 2020); State v. Davis, 507 S.W.3d 41 (Mo. Ct. App. E.D. 2016).

2 Janus v. American Federation of State, County, and Mun. Employees, Council 31, 138 S. Ct. 2448, 201 L. Ed. 2d 924 (2018) (First Amendment rights).

3 United States v. Farrar, 876 F.3d 702 (5th Cir. 2017); State v. Wilson, 144 Haw. 454, 445 P.3d 35 (2019); City of Kalispell v. Salsgiver, 2019 MT 126, 396 Mont. 57, 443 P.3d 504 (2019); OSI Restaurant Partners, LLC v. Oscoda Plastics, Inc., 831 S.E.2d 386 (N.C. Ct. App. 2019); Pennsylvania Liquor Control Board v. Beh, 215 A.3d 1046 (Pa. Commw. Ct. 2019); Matter of Schorr, 191 Wash. 2d 315, 422 P.3d 451 (2018), as amended (Oct. 9, 2018).

A waiver of fundamental constitutional rights must be knowing and voluntary. United States v. Spalding, 894 F.3d 173, 106 Fed. R. Evid. Serv. 947 (5th Cir. 2018); Groenewold v. Kelley, 888 F.3d 365, 353 Ed. Law Rep. 610 (8th Cir. 2018).

A waiver of a constitutional right must be knowing and intelligent. State v. Davis, 507 S.W.3d 41 (Mo. Ct. App. E.D. 2016).

A waiver of a constitutional right is ordinarily valid only if there is an intentional relinquishment of a known right. Moore v. State, 287 So. 3d 189 (Miss. 2020); State v. Rose, 458 N.J. Super. 610, 206 A.3d 995 (App. Div. 2019), certification denied, 2020 WL 812148 (N.J. 2020).

4 Overbey v. Mayor of Baltimore, 930 F.3d 215 (4th Cir. 2019).

5 City of Kalispell v. Salsgiver, 2019 MT 126, 396 Mont. 57, 443 P.3d 504 (2019); State v. Herron, 183 Wash. 2d 737, 356 P.3d 709 (2015).

6 New York v. Hill, 528 U.S. 110, 120 S. Ct. 659, 145 L. Ed. 2d 560 (2000).

7 § 408.

8 Bingham v. Holder, 637 F.3d 1040 (9th Cir. 2011); San Diego County Water Authority v. Metropolitan Water Dist. of Southern California, 12 Cal. App. 5th 1124, 220 Cal. Rptr. 3d 346 (1st Dist. 2017), as modified on other grounds on denial of reh'g, (July 18, 2017); In re Dyer, 175 Wash. 2d 186, 283 P.3d 1103 (2012).

9 Stevens v. Commissioner of Public Safety, 850 N.W.2d 717 (Minn. Ct. App. 2014).

10 Chames v. DeMayo, 972 So. 2d 850 (Fla. 2007).

**End of Document**

**16A Am. Jur. 2d Constitutional Law § 402**

**American Jurisprudence, Second Edition** | May 2021 Update

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**IX. Fundamental Constitutional Rights and Privileges**

**A. In General**

# § 402. Protection of fundamental constitutional rights; strict scrutiny test

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 1050 to 1053

Constitutional guarantees of particular fundamental rights protect those rights from violation[1] or interference by the government[2] or burdens imposed by the government,[3] at least to the extent that the government interference is unwarranted[4] or the burden is undue.[5] Fundamental constitutional rights may not be made to yield to mere legislative discretion,[6] public interest,[7] or majority vote.[8]

Laws that severely burden,[9] substantially burden,[10] infringe on,[11] or significantly interfere with the exercise of a fundamental constitutional right are subject to review under a standard of strict judicial scrutiny,[12] requiring a compelling state interest and objectives that could not be achieved by less restrictive measures.[13] Fundamental rights may constitutionally be subject to reasonable regulations that do not significantly interfere with the assertion of that right; strict scrutiny applies only if a statute places a direct limit on a fundamental right.[14]

Strict scrutiny requires that the law in relation to the exercise of a fundamental constitutional right be narrowly tailored to further compelling governmental interests,[15] meaning that it targets and eliminates no more than the exact source of the evil it seeks to remedy,[16] as evidenced by factors of relatedness between the law and the stated governmental interest.[17] If a less restrictive alternative would serve the state's compelling interest with the same level of effectiveness, the state must use that alternative in order to satisfy strict scrutiny.[18] The application of strict scrutiny to a law that restricts a fundamental right depends on context, including the controlling facts, the reasons advanced by the government, relevant differences, and the fundamental right involved.[19]

  

Footnotes

1 GJA v. Oklahoma Dept. of Human Services, 2015 OK CIV APP 32, 347 P.3d 310 (Div. 4 2015).

2 Lafler v. Cooper, 566 U.S. 156, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012); Matter of Naomi B., 435 P.3d 918 (Alaska 2019); Bridgeville Rifle & Pistol Club, Ltd. v. Small, 176 A.3d 632 (Del. 2017).

3 National Association for Advancement of Colored People v. City of Philadelphia, 834 F.3d 435 (3d Cir. 2016); Beydoun v. Sessions, 871 F.3d 459 (6th Cir. 2017); Bridgeville Rifle & Pistol Club, Ltd. v. Small, 176 A.3d 632 (Del. 2017).

4 Speiser v. Randall, 357 U.S. 513, 78 S. Ct. 1332, 2 L. Ed. 2d 1460 (1958); State ex rel. Lindell v. Litscher, 2003 WI App 36, 260 Wis. 2d 454, 659 N.W.2d 413 (Ct. App. 2003).

5 State v. Edwards, 100 Conn. App. 565, 918 A.2d 1008 (2007); Bridgeville Rifle & Pistol Club, Ltd. v. Small, 176 A.3d 632 (Del. 2017); House of Prayer Ministries, Inc. v. Rush County Board of Zoning Appeals, 91 N.E.3d 1053 (Ind. Ct. App. 2018), transfer denied, 102 N.E.3d 287 (Ind. 2018).

Not every burden on the exercise of a constitutional right is invalid. Pasha v. State, 225 So. 3d 688 (Fla. 2017), cert. denied, 138 S. Ct. 995, 200 L. Ed. 2d 267 (2018).

6 Lafler v. Cooper, 566 U.S. 156, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012).

7 Packingham v. North Carolina, 137 S. Ct. 1730, 198 L. Ed. 2d 273 (2017); Brown v. Entertainment Merchants Ass'n, 564 U.S. 786, 131 S. Ct. 2729, 180 L. Ed. 2d 708 (2011).

8 Obergefell v. Hodges, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015); Brown v. Entertainment Merchants Ass'n, 564 U.S. 786, 131 S. Ct. 2729, 180 L. Ed. 2d 708 (2011).

9 Washington State Grange v. Washington State Republican Party, 552 U.S. 442, 128 S. Ct. 1184, 170 L. Ed. 2d 151 (2008); Tripp v. Scholz, 872 F.3d 857 (7th Cir. 2017), cert. denied, 138 S. Ct. 1447, 200 L. Ed. 2d 719 (2018); Arizona Libertarian Party v. Hobbs, 925 F.3d 1085 (9th Cir. 2019).

10 United States v. Jimenez, 895 F.3d 228 (2d Cir. 2018); Elster v. City of Seattle, 193 Wash. 2d 638, 444 P.3d 590 (2019).

Burdens that are incidental or negligible are insufficient to implicate the denial of a fundamental right protected by the constitution. Beydoun v. Sessions, 871 F.3d 459 (6th Cir. 2017).

Modest burdens may not require strict scrutiny of reasonable, nondiscriminatory restrictions. Washington State Grange v. Washington State Republican Party, 552 U.S. 442, 128 S. Ct. 1184, 170 L. Ed. 2d 151 (2008).

11 Hernandez v. State, 173 A.D.3d 105, 99 N.Y.S.3d 795 (3d Dep't 2019); State v. Weber, 2019-Ohio-916, 132 N.E.3d 1140 (Ohio Ct. App. 12th Dist. Clermont County 2019), appeal not allowed, 156 Ohio St. 3d 1452, 2019-Ohio-2780, 125 N.E.3d 941 (2019).

12 Beydoun v. Sessions, 871 F.3d 459 (6th Cir. 2017); Boultinghouse v. State, 120 N.E.3d 586 (Ind. Ct. App. 2019), transfer denied, 127 N.E.3d 236 (Ind. 2019); State v. Webb, 144 So. 3d 971 (La. 2014).

13 Washington State Grange v. Washington State Republican Party, 552 U.S. 442, 128 S. Ct. 1184, 170 L. Ed. 2d 151 (2008); Kenniston v. Department of Youth Services, 453 Mass. 179, 900 N.E.2d 852 (2009); Dugan v. State, 2019 WY 112, 451 P.3d 731 (Wyo. 2019), cert. denied, 2020 WL 1124448 (U.S. 2020).

The state must employ the least intrusive means to satisfy its compelling interest. Grafilo v. Soorani, 41 Cal. App. 5th 497, 254 Cal. Rptr. 3d 149 (2d Dist. 2019).

14 Estes v. State, 566 S.W.3d 342 (Tex. App. Fort Worth 2018).

15 Kolbe v. Hogan, 849 F.3d 114 (4th Cir. 2017); Marianist Province of United States v. City of Kirkwood, 944 F.3d 996, 372 Ed. Law Rep. 556 (8th Cir. 2019); Arizona Libertarian Party v. Hobbs, 925 F.3d 1085 (9th Cir. 2019); AFSCME Iowa Council 61 v. State, 928 N.W.2d 21 (Iowa 2019); Hernandez v. State, 173 A.D.3d 105, 99 N.Y.S.3d 795 (3d Dep't 2019); Elster v. City of Seattle, 193 Wash. 2d 638, 444 P.3d 590 (2019); Matter of Visitation of A. A. L., 2019 WI 57, 387 Wis. 2d 1, 927 N.W.2d 486 (2019).

16 Victory Processing, LLC v. Fox, 937 F.3d 1218 (9th Cir. 2019).

The law must be narrowly drawn to express only those compelling state interests. Bostic v. Schaefer, 760 F.3d 352 (4th Cir. 2014).

17 Republican Party of Minnesota v. White, 416 F.3d 738 (8th Cir. 2005).

18 Victory Processing, LLC v. Fox, 937 F.3d 1218 (9th Cir. 2019); Worsham v. State, 2019 Ark. App. 65, 572 S.W.3d 1 (2019).

19 State v. Merritt, 467 S.W.3d 808 (Mo. 2015).

End of Document

# 16A Am. Jur. 2d Constitutional Law § 403

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**IX. Fundamental Constitutional Rights and Privileges**

**A. In General**

## § 403. Natural rights as fundamental constitutional rights

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 1067

Statements by some courts indicate constitutional protection for rights termed "natural," in addition to rights protected under the specific guarantee safeguarding a person in life, liberty, or pursuit of happiness,[1] such as a natural right of personal autonomy.[2] Certain rights are inherent to mankind, and thus are secured rather than bestowed by the constitution.[3] Other courts do not find that natural law constitutes a source of unenumerated rights under a state constitutional scheme, and that unenumerated constitutional rights exist, if at all, only if they are grounded in or derived from the constitutional text of the state's unique historical record.[4]

Most of the "fundamental rights" under the United States Constitution were at one time deemed natural rights by the American founding fathers, such as freedom of religion,[5] freedom of assembly and association,[6] the right to contract and the right to own property.[7]

The leading test of substantive due process, the reasonableness norm, has manifold natural law antecedents.[8] Procedural due process, as well, has customarily been defined by recourse to natural law and natural right principles.[9]

A natural affection between parents and offspring has always been a recognized inherent, natural right, for the protection of which, just as much as for the protection of the rights of the individual to life, liberty, and pursuit of happiness, our government is formed, within the liberty protection of a state constitution,[10] including the natural rights between a parent and a natural child of the parent,[11] a natural right to make decisions about parenting and procreation,[12] and the right to beget and bear children.[13]

  

Footnotes

1 People v. Shephard, 152 Ill. 2d 489, 178 Ill. Dec. 724, 605 N.E.2d 518 (1992); Hodes & Nauser, MDs, P.A. v. Schmidt, 309 Kan. 610, 440 P.3d 461 (2019); Preterm Cleveland v. Voinovich, 89 Ohio App. 3d 684, 627 N.E.2d 570 (10th Dist. Franklin County 1993).
For judicial consideration of natural rights or natural justice in determining the constitutionality of legislation, see §§ 183, 185.

2 Hodes & Nauser, MDs, P.A. v. Schmidt, 309 Kan. 610, 440 P.3d 461 (2019).

3 Driscoll v. Corbett, 620 Pa. 494, 69 A.3d 197 (2013).

4 State v. Webb, 238 Conn. 389, 680 A.2d 147 (1996).

5 Fowler v. State of R.I., 345 U.S. 67, 73 S. Ct. 526, 97 L. Ed. 828 (1953).

6 U.S. v. Cruikshank, 92 U.S. 542, 23 L. Ed. 588, 1875 WL 17550 (1875).

7 State v. Webber, 85 Or. App. 347, 736 P.2d 220 (1987).

8 § 934.

9 §§ 945 to 948.

10 Hawk v. Hawk, 855 S.W.2d 573 (Tenn. 1993).

11 In re C.D.S., 172 S.W.3d 179 (Tex. App. Fort Worth 2005).

12 Hodes & Nauser, MDs, P.A. v. Schmidt, 309 Kan. 610, 440 P.3d 461 (2019).

13 A.W. ex rel. B.W. v. Department of Children and Families, 969 So. 2d 496 (Fla. 1st DCA 2007).

**End of Document**

# 16A Am. Jur. 2d Constitutional Law § 404

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**IX. Fundamental Constitutional Rights and Privileges**

**A. In General**

## § 404. "Free man" philosophy as source of fundamental constitutional rights

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 1050, 1065

Persons are not exempt from regulatory statutes on the basis of a claim that they are "free men" and not 14th Amendment citizens with no obligation to obey state or federal law.[1] An individual has no right to unilaterally withdraw from society, rejecting obligations to that body, while at the same time retaining the advantages of that society, advantages for which others have sacrificed part of their liberty.[2] Donning the mantle of a "sovereign human being" and "common law free man" does not defeat a court's exercise of personal jurisdiction.[3]



Footnotes

1 State v. Folda, 267 Mont. 523, 885 P.2d 426 (1994).
A defendant, seeking a declaration of rights as a "free man," is not entitled to exemption from license or financial responsibility laws. Gordon v. State, 108 Idaho 178, 697 P.2d 1192 (Ct. App. 1985).

2 State v. Gibson, 108 Idaho 202, 697 P.2d 1216 (Ct. App. 1985).

3 Schaghticoke Indian Tribe v. Rost, 138 Conn. App. 204, 50 A.3d 411 (2012).

# 16A Am. Jur. 2d Constitutional Law § 405

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**IX. Fundamental Constitutional Rights and Privileges**

**A. In General**

## § 405. Individuals entitled to fundamental constitutional rights

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 1052, 1062, 1063

The freedom secured by the United States Constitution consists, in one of its essential dimensions, of the fundamental right of the individual not to be injured by the unlawful exercise of governmental power.[1] Certain fundamental constitutional rights, like the guarantees that all citizens enjoy equal protection of the laws and due process of law, are not structural limitations on government power but they are rights given to individual citizens which limit governmental power generally, and, as such, these rights accrue to individual citizens.[2] Purely person constitutional guarantees are limited to the protection of individuals, such as the Fifth Amendment privilege against self-incrimination and the right to privacy.[3] Whether a particular constitutional guarantee is purely personal depends on the nature, history, and purpose of the particular constitutional provision.[4]

Fundamental constitutional rights extend to minors as well as adults,[5] but some differences apply to minors,[6] as in recognition of the peculiar vulnerability of minors, their inability to make critical decisions in an informed, mature manner,[7] and the importance of the parental role in child rearing.[8]

Fundamental constitutional rights generally apply to persons in the United States, not only citizens of the United States,[9] but certain constitutional provisions are by their terms applicable only to citizens, such as the provision that no state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States,[10] and aliens who have not yet entered into the territorial jurisdiction of the United States do not enjoy the protection of constitutional provisions.[11]

Footnotes

1 Obergefell v. Hodges, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015).
Constitutional protections belong to persons. Town of Dartmouth v. Greater New Bedford Regional Vocational Technical High School Dist., 461 Mass. 366, 961 N.E.2d 83, 276 Ed. Law Rep. 411 (2012).

2 San Diego County Water Authority v. Metropolitan Water Dist. of Southern California, 12 Cal. App. 5th 1124, 220 Cal. Rptr. 3d 346 (1st Dist. 2017), as modified on other grounds on denial of reh'g, (July 18, 2017).

3 Colorado Department of Labor and Employment v. Dami Hospitality, LLC, 2019 CO 47M, 442 P.3d 94 (Colo. 2019), as modified on other grounds on denial of reh'g, (June 17, 2019) and cert. denied, 140 S. Ct. 849 (2020) and cert. denied, 140 S. Ct. 900 (2020).

4 Beckwith Elec. Co., Inc. v. Sebelius, 960 F. Supp. 2d 1328 (M.D. Fla. 2013).

5 Application of Gault, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967); People In Interest of J.V.D., 2019 COA 70, 442 P.3d 1030 (Colo. App. 2019); A.M. v. State, 134 N.E.3d 361 (Ind. 2019); B.H. v. Commonwealth, 494 S.W.3d 467 (Ky. 2016), as modified on other grounds, (Apr. 13, 2016) and as modified on other grounds on reh'g, (Aug. 25, 2016); State v. Hand, 149 Ohio St. 3d 94, 2016-Ohio-5504, 73 N.E.3d 448 (2016).

6 People In Interest of J.V.D., 2019 COA 70, 442 P.3d 1030 (Colo. App. 2019); L.S. v. State, 120 So. 3d 55 (Fla. 4th DCA 2013); In re R.H., 2017 IL App (1st) 171332, 421 Ill. Dec. 29, 99 N.E.3d 29 (App. Ct. 1st Dist. 2017); B.H. v. Commonwealth, 494 S.W.3d 467 (Ky. 2016), as modified on other grounds, (Apr. 13, 2016) and as modified on other grounds on reh'g, (Aug. 25, 2016); State v. J.R., 2018 ME 117, 191 A.3d 1157 (Me. 2018).

7 L.S. v. State, 120 So. 3d 55 (Fla. 4th DCA 2013); In re R.H., 2017 IL App (1st) 171332, 421 Ill. Dec. 29, 99 N.E.3d 29 (App. Ct. 1st Dist. 2017).

8 In re R.H., 2017 IL App (1st) 171332, 421 Ill. Dec. 29, 99 N.E.3d 29 (App. Ct. 1st Dist. 2017); In re F.C. III, 607 Pa. 45, 2 A.3d 1201 (2010).

9 Bado v. United States, 186 A.3d 1243 (D.C. 2018).

10 Am. Jur. 2d, Aliens and Citizens § 1831.

11 Am. Jur. 2d, Aliens and Citizens § 1827.

End of Document

# 16A Am. Jur. 2d Constitutional Law § 406

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**IX. Fundamental Constitutional Rights and Privileges**

**A. In General**

## § 406. Business and governmental entities entitled to fundamental constitutional rights

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 1050, 1065

A corporation is within the protection of some constitutional guarantees, such as property rights, freedom of religion, freedom of speech, equal protection, and due process,[1] but not constitutional guarantees that are purely personal, such as the Fifth Amendment privilege against self-incrimination and the right to privacy.[2]

Certain fundamental constitutional rights, like the guarantees that all citizens enjoy equal protection of the laws and due process of law, do not accrue to units of government.[3] Municipalities and other units of government are not vested with constitutional rights under the state constitutions or the United States Constitution.[4] A state is not a "person" within the meaning of the constitutional guarantees relating to due process of law, equal rights, and privileges and immunities.[5]



Footnotes

1 Am. Jur. 2d, Corporations § 68.

2 Colorado Department of Labor and Employment v. Dami Hospitality, LLC, 2019 CO 47M, 442 P.3d 94 (Colo. 2019), as modified on other grounds on denial of reh'g, (June 17, 2019) and cert. denied, 140 S. Ct. 849 (2020) and cert. denied, 140 S. Ct. 900 (2020).

3 San Diego County Water Authority v. Metropolitan Water Dist. of Southern California, 12 Cal. App. 5th 1124, 220 Cal. Rptr. 3d 346 (1st Dist. 2017), as modified on other grounds on denial of reh'g, (July 18, 2017).

4 El Paso County v. El Paso County Emergency Services District No. 1, 2020 WL 91208 (Tex. App. El Paso 2020).

5 Durish v. Texas State Bd. of Ins., 817 S.W.2d 764 (Tex. App. Texarkana 1991).

End of Document

# 16A Am. Jur. 2d Constitutional Law § 407

**American Jurisprudence, Second Edition** | May 2021 Update

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**IX. Fundamental Constitutional Rights and Privileges**

**A. In General**

## § 407. State support for exercise of fundamental constitutional rights

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 1050, 1061

The state is under no obligation to subsidize the exercise of fundamental constitutional rights by those entitled to exercise their rights, as a state's decision not to subsidize the exercise of a right does not infringe that right.[1] For example, the government may refuse to subsidize abortion services.[2] However, the state cannot base access to the enforcement of a constitutional right on a person's financial situation[3] or place certain conditions the exercise of a constitutional right.[4] Otherwise, the state is not obligated to remove obstacles to the exercise of constitutional rights that it did not create, including a lack of financial resources.[5]

Legislation that simply dictates the proper scope of government-funded programs is constitutional, while legislation that restricts constitutionally protected grantee activities outside government programs is unconstitutional, and the Constitution does not guarantee that recipients of state funds will not be required to expend effort to comply with funding restrictions.[6]



Footnotes

1 Koala v. Khosla, 931 F.3d 887, 368 Ed. Law Rep. 653 (9th Cir. 2019).
The constitutional protection of fundamental freedoms does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom. Thompson v. C.I.R., 140 T.C. 173, 2013 WL 791068 (2013).
The Government has no constitutional obligation to fund the exercise of a constitutional right. Dolores Huerta Preparatory High v. Colorado State Bd. of Educ., 215 P.3d 1229, 248 Ed. Law Rep. 882 (Colo. App. 2009).

2 Planned Parenthood of Greater Ohio v. Hodges, 917 F.3d 908 (6th Cir. 2019).

3 Planned Parenthood of the Heartland v. Reynolds ex rel. State, 915 N.W.2d 206 (Iowa 2018).

4 § 408.

5 Student Government Ass'n v. Board of Trustees of University of Massachusetts, 868 F.2d 473, 52 Ed. Law Rep. 28 (1st Cir. 1989); Texas Dept. of Human Resources v. Texas State Employees Union CWA/AFL-CIO, 696 S.W.2d 164 (Tex. App. Austin 1985).

The state is not required to equalize the ability to exercise fundamental rights in the private sector regarding persons of differing wealth. State, Dept. of Health and Welfare ex rel. Martz v. Reid, 124 Idaho 908, 865 P.2d 999 (Ct. App. 1993).

6 Planned Parenthood of Mid-Missouri and Eastern Kansas, Inc. v. Dempsey, 167 F.3d 458 (8th Cir. 1999).

End of Document

# 16A Am. Jur. 2d Constitutional Law § 408

**American Jurisprudence, Second Edition** | May 2021 Update

**Constitutional Law**
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**IX. Fundamental Constitutional Rights and Privileges**

**A. In General**

## § 408. Conditions on exercise of fundamental constitutional rights

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 1057

The "unconstitutional conditions doctrine" vindicates the United States Constitution's enumerated rights by preventing the government from coercing people into giving them up, recognizing the principle that the government may not deny a benefit to a person because the person exercises a constitutional right,[1] and may not require a person to give up a constitutional right in exchange for a discretionary benefit conferred by the government.[2] The government may not deny a benefit to a person on a basis that infringes a fundamental constitutionally protected right even if the person has no entitlement to that benefit.[3] Regardless of whether the government ultimately succeeds in pressuring someone into forfeiting a constitutional right, the doctrine forbids burdening the Constitution's enumerated rights by coercively withholding benefits from those who exercise them.[4] However, a predicate for any unconstitutional conditions claim is that the government could not have constitutionally ordered the person asserting the claim to do what it attempted to pressure that person into doing.[5] The doctrine does not prevent the government from using conditions to produce a result which it could command directly.[6]

Not all conditions are prohibited under the doctrine of unconstitutional conditions; if the condition is sufficiently related to the benefit, then it may validly be imposed, and in the final analysis, the legitimacy of a governmental proposal depends on the degree of relatedness between the condition on a benefit and the reasons why government may withhold the benefit altogether.[7] Under a two-part test for analyzing claims that an unconstitutional condition has been imposed, a court first asks whether there is an essential nexus between the condition burdening rights and a legitimate state interest and, second, asks whether there is a rough proportionality between the burden on the individual and the harm the government seeks to remedy through the condition.[8]

  

Given the typically broad powers wielded by permitting officials, landowners who seek governmental authorization to develop their properties are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits.[9] The test for determining whether a condition is unconstitutional under the doctrine of unconstitutional conditions is viewed as a type of heightened scrutiny in a takings context.[10] The doctrine applies only where the condition at issue constitutes an "exaction" in the form of either the conveyance of a property interest or the payment of money.[11] The government may not require a person to give up a constitutional right in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property.[12]

The Constitution does not forbid every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights.[13] A criminal defendant may be asked, in the interest of orderly procedures, to choose between waiver of a right and another course of action as long as the choice presented is not constitutionally offensive.[14]



Footnotes

1 Koontz v. St. Johns River Water Management Dist., 570 U.S. 595, 133 S. Ct. 2586, 186 L. Ed. 2d 697 (2013); Planned Parenthood of Greater Ohio v. Hodges, 917 F.3d 908 (6th Cir. 2019); Willie Pearl Burrell Trust v. City of Kankakee, 2016 IL App (3d) 150655, 404 Ill. Dec. 654, 56 N.E.3d 1067 (App. Ct. 3d Dist. 2016); Alpine Homes, Inc. v. City of West Jordan, 2017 UT 45, 424 P.3d 95 (Utah 2017).
The "unconstitutional conditions doctrine" prevents the Government from using conditions to produce a result which it could not command directly. Oil States Energy Services, LLC v. Greene's Energy Group, LLC, 138 S. Ct. 1365, 200 L. Ed. 2d 671 (2018).
The liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege. Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 198 L. Ed. 2d 551 (2017).

2 Lindstrom v. California Coastal Com., 40 Cal. App. 5th 73, 252 Cal. Rptr. 3d 817 (4th Dist. 2019); Willie Pearl Burrell Trust v. City of Kankakee, 2016 IL App (3d) 150655, 404 Ill. Dec. 654, 56 N.E.3d 1067 (App. Ct. 3d Dist. 2016); Shin v. Commonwealth, 294 Va. 517, 808 S.E.2d 401 (2017).

3 Agency for Intern. Development v. Alliance for Open Society Intern., Inc., 570 U.S. 205, 133 S. Ct. 2321, 186 L. Ed. 2d 398 (2013); Rumsfeld v. Forum for Academic and Institutional Rights, Inc., 547 U.S. 47, 126 S. Ct. 1297, 164 L. Ed. 2d 156, 206 Ed. Law Rep. 819 (2006).
The doctrine bars the government from arbitrarily conditioning the grant of a benefit on the surrender of a constitutional right, regardless of the fact that the government appropriately might have refused to grant the benefit at all. Gonya v. Commissioner, New Hampshire Ins. Dept., 153 N.H. 521, 899 A.2d 278 (2006); Felkner v. Rhode Island College, 203 A.3d 433, 364 Ed. Law Rep. 560 (R.I. 2019).

4 Koontz v. St. Johns River Water Management Dist., 570 U.S. 595, 133 S. Ct. 2586, 186 L. Ed. 2d 697 (2013).

5 Koontz v. St. Johns River Water Management Dist., 570 U.S. 595, 133 S. Ct. 2586, 186 L. Ed. 2d 697 (2013); Lindstrom v. California Coastal Com., 40 Cal. App. 5th 73, 252 Cal. Rptr. 3d 817 (4th Dist. 2019).

6 Oil States Energy Services, LLC v. Greene's Energy Group, LLC, 138 S. Ct. 1365, 200 L. Ed. 2d 671 (2018).

7 Felkner v. Rhode Island College, 203 A.3d 433, 364 Ed. Law Rep. 560 (R.I. 2019).
If a condition is sufficiently related to the benefit, then it may validly be imposed. Gonya v. Commissioner, New Hampshire Ins. Dept., 153 N.H. 521, 899 A.2d 278 (2006).
Under the unconstitutional conditions doctrine of California law, a governmental entity seeking to condition the receipt of a public benefit upon waiver of a constitutional right must establish that (1) conditions reasonably relate to purposes sought by legislation which confers benefit, (2) value accruing to the public from imposition of those conditions manifestly outweighs any resulting impairment of constitutional rights, and (3) there are no alternative means less subversive of constitutional right, narrowly drawn so as to correlate more closely with purposes contemplated by conferring benefit. Under the doctrine, when receipt of a public benefit is conditioned upon a waiver of a constitutional right, the government bears the heavy

burden of demonstrating the practical necessity for limitation. Sanchez v. County of San Diego, 464 F.3d 916 (9th Cir. 2006).

8 Willie Pearl Burrell Trust v. City of Kankakee, 2016 IL App (3d) 150655, 404 Ill. Dec. 654, 56 N.E.3d 1067 (App. Ct. 3d Dist. 2016).

9 Martin v. United States, 894 F.3d 1356 (Fed. Cir. 2018), cert. denied, 139 S. Ct. 802, 202 L. Ed. 2d 573 (2019).

10 Lindstrom v. California Coastal Com., 40 Cal. App. 5th 73, 252 Cal. Rptr. 3d 817 (4th Dist. 2019).

11 Beach & Bluff Conservancy v. City of Solana Beach, 28 Cal. App. 5th 244, 239 Cal. Rptr. 3d 86 (4th Dist. 2018).

A demand for money in exchange for a land use permit is an unconstitutional condition under the takings clause unless the government can show an essential nexus and rough proportionality between the amount of money requested and the social costs of the proposed development. Alpine Homes, Inc. v. City of West Jordan, 2017 UT 45, 424 P.3d 95 (Utah 2017).

12 Philip Morris, Inc. v. Reilly, 312 F.3d 24 (1st Cir. 2002); Vance v. Barrett, 345 F.3d 1083 (9th Cir. 2003); Lindstrom v. California Coastal Com., 40 Cal. App. 5th 73, 252 Cal. Rptr. 3d 817 (4th Dist. 2019).

13 State v. Okken, 238 Ariz. 566, 364 P.3d 485 (Ct. App. Div. 1 2015); State v. Ryce, 303 Kan. 899, 368 P.3d 342 (2016), adhered to on reh'g, 306 Kan. 682, 396 P.3d 711 (2017); State v. Rajda, 208 Vt. 324, 2018 VT 72, 196 A.3d 1108 (2018).

14 Lathem v. State, 514 S.W.3d 796 (Tex. App. Fort Worth 2017).

End of Document

**16A Am. Jur. 2d Constitutional Law § 409**

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**Constitutional Law**
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**IX. Fundamental Constitutional Rights and Privileges**

**A. In General**

# § 409. Judicial enforcement of fundamental constitutional rights against state or individual

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 1050, 1061

The constitutional guarantee of fundamental rights requires redress by the courts when the rights of persons are violated or require protection, notwithstanding the more general value of democratic decision-making, and this holds true even when protecting individual rights affects issues of the utmost importance and sensitivity.[1] The dynamic of the constitutional system is that individuals need not await legislative action before asserting a fundamental right; the nation's courts are open to injured individuals who come to them to vindicate their own direct, personal stake in the basic charter, and an individual can invoke a right to constitutional protection when harmed, even if the broader public disagrees and even if the legislature refuses to act.[2]

The enforcement of fundamental rights guaranteed by the constitution is generally against state action and a state actor,[3] meaning that the government is responsible,[4] not private parties.[5] A two-part test applies to determine the existence of state action as prerequisite to a constitutional claim: (1) the deprivation must be caused by exercise of some right or privilege created by the state or by a rule of conduct imposed by the state, and (2) the party charged with the deprivation must be a person who may fairly be said to be a state actor.[6]

A state actor may, in limited circumstances, include a private entity when (1) the private entity performs a traditional, exclusive public function; (2) the government compels the private entity to take a particular action; or (3) the government acts jointly with the private entity.[7] For this purpose, a private entity may qualify as a state actor when it exercises powers traditionally exclusively reserved to the state; it is not enough that the federal, state, or local government exercised the function in the past, or still does, and it is not enough that the function serves the public good or the public interest in some way.[8] A plaintiff complaining that the actions of a nominally private entity violated the plaintiff's constitutional rights makes the required showing that the

  

private entity is a state actor by demonstrating that there is such a close nexus between the state and the challenged action that seemingly private behavior may be fairly treated as that of the state itself.[9] The determination is a matter of normative judgment that does not lend itself to brightline rules or rigid criteria; instead, a host of factors can bear on the fairness of an attribution of a challenged action to the state.[10]



Footnotes

1 Obergefell v. Hodges, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015).

2 Obergefell v. Hodges, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015).

3 Manhattan Community Access Corporation v. Halleck, 139 S. Ct. 1921, 204 L. Ed. 2d 405 (2019); Grogan v. Blooming Grove Volunteer Ambulance Corps, 768 F.3d 259 (2d Cir. 2014); Roberts v. AT&T Mobility LLC, 877 F.3d 833 (9th Cir. 2017), cert. denied, 138 S. Ct. 2653, 201 L. Ed. 2d 1051 (2018); Howard v. Aspen Way Enterprises, Inc., 2017 WY 152, 406 P.3d 1271 (Wyo. 2017).
The state constitution's provisions are triggered only by state action. State v. Beecroft, 813 N.W.2d 814 (Minn. 2012).

4 Peery v. Chicago Housing Authority, 791 F.3d 788 (7th Cir. 2015).

5 Grogan v. Blooming Grove Volunteer Ambulance Corps, 768 F.3d 259 (2d Cir. 2014); Roberts v. AT&T Mobility LLC, 877 F.3d 833 (9th Cir. 2017), cert. denied, 138 S. Ct. 2653, 201 L. Ed. 2d 1051 (2018); State v. Beecroft, 813 N.W.2d 814 (Minn. 2012).

6 Grogan v. Blooming Grove Volunteer Ambulance Corps, 768 F.3d 259 (2d Cir. 2014); Roberts v. AT&T Mobility LLC, 877 F.3d 833 (9th Cir. 2017), cert. denied, 138 S. Ct. 2653, 201 L. Ed. 2d 1051 (2018).

7 Manhattan Community Access Corporation v. Halleck, 139 S. Ct. 1921, 204 L. Ed. 2d 405 (2019).

8 Manhattan Community Access Corporation v. Halleck, 139 S. Ct. 1921, 204 L. Ed. 2d 405 (2019).
Under a state constitution, a private individual may qualify as a state actor while acting in an official capacity under the authority of the state or while exercising responsibilities pursuant to state law. State v. Beecroft, 813 N.W.2d 814 (Minn. 2012).

9 Grogan v. Blooming Grove Volunteer Ambulance Corps, 768 F.3d 259 (2d Cir. 2014).

10 Grogan v. Blooming Grove Volunteer Ambulance Corps, 768 F.3d 259 (2d Cir. 2014).

**End of Document**

# 16A Am. Jur. 2d Constitutional Law § 410

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**IX. Fundamental Constitutional Rights and Privileges**

**A. In General**

## § 410. Judicial enforcement of fundamental constitutional rights against state or individual—Sovereign immunity

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 4862, 4863

The power of Congress under the 14th Amendment to enforce its provisions includes the power to abrogate state sovereign immunity by authorizing private suits for damages against the States for violations of the Amendment.[1] Congress can abrogate the states' Eleventh Amendment sovereign immunity through a valid exercise of its power under the enforcement section of the 14th Amendment if Congress (1) makes clear that it is relying on the enforcement section of the 14th Amendment as the source of its authority, and (2) ensures that any abrogation of immunity is congruent and proportional to the 14th Amendment injury to be prevented or remedied.[2]



Footnotes

1 U.S. v. Georgia, 546 U.S. 151, 126 S. Ct. 877, 163 L. Ed. 2d 650 (2006); Kimel v. Florida Bd. of Regents, 528 U.S. 62, 120 S. Ct. 631, 145 L. Ed. 2d 522, 140 Ed. Law Rep. 825, 187 A.L.R. Fed. 543 (2000); Bay Point Properties, Incorporated v. Mississippi Transportation Commission, 937 F.3d 454 (5th Cir. 2019); Board Of Regents of University Of Wisconsin System v. Phoenix Intern. Software, Inc., 653 F.3d 448, 272 Ed. Law Rep. 79 (7th Cir. 2011).

**A.L.R. Library**

Immunity of State from Civil Suits Under Eleventh Amendment—Supreme Court Cases, 187 A.L.R. Fed. 175.

2 Allen v. Cooper, 895 F.3d 337 (4th Cir. 2018), cert. granted, 139 S. Ct. 2664, 204 L. Ed. 2d 1068 (2019).

End of Document

**16A Am. Jur. 2d Constitutional Law § 411**

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**IX. Fundamental Constitutional Rights and Privileges**

**A. In General**

# § 411. Limitations on fundamental constitutional rights

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 1054 to 1057

The fundamental constitutional rights guaranteed by the constitution[1] are not absolute[2] or unlimited,[3] and may be subject to reasonable regulations[4] that do not significantly interfere with the rights or directly limit the rights.[5] Not every burden on the exercise of a constitutional right is invalid[6] and not every law which makes the exercise of a constitutional right more difficult is an infringement of that right.[7] The state may burden the exercise of fundamental constitutional rights in limited circumstances,[8] provided the burden is not material, substantial,[9] and impermissible,[10] and provided the state's limiting action is justified.[11] The courts determine the boundaries of individual constitutional rights by balancing the importance of the right at issue against the state's interests in imposing a disputed limitation,[12] applying, in the case of fundamental rights, a test of strict scrutiny for compelling state interests in the infringement or burdening of the rights without available less restrictive means to achieve those interests.[13] Constitutional doctrines are not necessarily static, and the court's analysis of a constitutional claim instead considers current prevailing standards that draw their meaning from the evolving standards that mark the progress of a maturing society.[14]

Constitutional guarantees do not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries.[15]



Footnotes

1 § 400.

2 O'Donnell v. Brown, 335 F. Supp. 2d 787 (W.D. Mich. 2004); Tender Loving Care Management, Inc. v. Sherls, 14 N.E.3d 67 (Ind. Ct. App. 2014); State v. Wiggins, 139 So. 3d 1 (La. Ct. App. 1st Cir. 2014); Com. v. Weston W., 455 Mass. 24, 913 N.E.2d 832 (2009).
The constitutional rights secured to citizens may be restricted under certain circumstances. Johnson v. King, 85 So. 3d 307 (Miss. Ct. App. 2012).

3 Planned Parenthood of the Heartland v. Reynolds ex rel. State, 915 N.W.2d 206 (Iowa 2018).

4 Planned Parenthood of the Heartland v. Reynolds ex rel. State, 915 N.W.2d 206 (Iowa 2018); Estes v. State, 566 S.W.3d 342 (Tex. App. Fort Worth 2018).

5 Estes v. State, 566 S.W.3d 342 (Tex. App. Fort Worth 2018).

6 Pasha v. State, 225 So. 3d 688 (Fla. 2017), cert. denied, 138 S. Ct. 995, 200 L. Ed. 2d 267 (2018); Herron v. Commonwealth, 55 Va. App. 691, 688 S.E.2d 901 (2010).

7 Planned Parenthood of Indiana and Kentucky, Inc. v. Commissioner, Indiana State Department of Health, 273 F. Supp. 3d 1013 (S.D. Ind. 2017), aff'd, 896 F.3d 809 (7th Cir. 2018), petition for certiorari filed (U.S. Feb. 4, 2019).

8 O'Donnell v. Brown, 335 F. Supp. 2d 787 (W.D. Mich. 2004).

9 Wilder v. State, 91 N.E.3d 1016 (Ind. Ct. App. 2018).

10 People v. Clary, 494 Mich. 260, 833 N.W.2d 308 (2013); State v. Rajda, 208 Vt. 324, 2018 VT 72, 196 A.3d 1108 (2018).

11 State v. Edwards, 48 Kan. App. 2d 264, 288 P.3d 494, 286 Ed. Law Rep. 719 (2012); State v. Wiggins, 139 So. 3d 1 (La. Ct. App. 1st Cir. 2014); State v. Enquist, 163 Wash. App. 41, 256 P.3d 1277 (Div. 2 2011).

12 Matter of Naomi B., 435 P.3d 918 (Alaska 2019).

13 § 402.

14 Planned Parenthood of the Heartland v. Reynolds ex rel. State, 915 N.W.2d 206 (Iowa 2018).

15 Sanders v. Boutwell, 2019 WL 6331206 (M.D. Ala. 2019); Deal v. Brooks, 2016 OK CIV APP 81, 389 P.3d 375 (Div. 2 2016).

**End of Document**

# 16A Am. Jur. 2d Constitutional Law IX B Refs.

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**Constitutional Law**
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**IX. Fundamental Constitutional Rights and Privileges**

**B. Constitutional Amendments as Source of Fundamental Rights**

Topic Summary | Correlation Table

## Research References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 1053, 1065, 1067, 1070, 1071, 1073

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A.L.R. Index, Freedom of Religion
A.L.R. Index, Freedom of Speech and Press
West's A.L.R. Digest, Constitutional Law 1053, 1065, 1067, 1070, 1071, 1073



**End of Document**

**16A Am. Jur. 2d Constitutional Law § 412**

**American Jurisprudence, Second Edition** | May 2021 Update

**Constitutional Law**
Barbara J. Van Arsdale, J.D.; James Buchwalter, J.D; Paul M. Coltoff, J.D.; John A. Gebauer, J.D.; Lonnie E. Griffith, Jr., J.D.; Janice Holben, J.D.; Sonja Larsen, J.D.; Lucas Martin, J.D.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Karl Oakes, J.D.; Karen L. Schultz, J.D.; Jeffrey J. Shampo, J.D.; and Kimberly C. Simmons, J.D.

**IX. Fundamental Constitutional Rights and Privileges**

**B. Constitutional Amendments as Source of Fundamental Rights**

# § 412. Federal Bill of Rights as source of fundamental constitutional rights

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 1067, 1071

**Forms**

Forms relating to action arising under Constitution, generally, see Am. Jur. Pleading and Practice Forms, Federal Practice and Procedure [Westlaw®(r) Search Query]

In the first 10 amendments to the United States Constitution[1]—the Bill of Rights[2]—the Framers sought to restrict the exercise of arbitrary authority by the government in particular situations,[3] setting forth and defining powers which the people seek to retain within themselves.[4] The Bill of Rights withdraws certain subjects from the vicissitudes of political controversy and elections, placing them beyond the reach of majorities and officials and establishing them as legal principles to be applied by the courts.[5] Otherwise applicable only to the federal government, the Bill of Rights extends to the states through the Due Process Clause of the 14th Amendment, forbidding a denial of any of the fundamental principles of liberty and justice.[6]

The generations that wrote and ratified the Bill of Rights did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as its meaning is learned; when new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed, including the recognition of fundamental rights not traditionally recognized.[7] Nonetheless, without the

  

promise of a limiting Bill of Rights, it is doubtful that the United States Constitution could have mustered enough strength to gain ratification.[8]

Fundamental rights guaranteed by the United States Constitution include those explicitly or implicitly guaranteed by the Bill of Rights,[9] including freedom of religion,[10] freedom of speech and press[11] freedom of assembly and petition,[12] the right to bear arms,[13] freedom from the quartering of soldiers;[14] freedom from unreasonable searches and seizures;[15] freedom from excessive bail;[16] freedom from excessive fines[17] and cruel and unusual punishments;[18] freedom double jeopardy;[19] freedom from compelled self-incrimination;[20] freedom from the deprivation of life, liberty, or property without due process of law;[21] freedom from the taking of property for public use without just compensation;[22] the right to presentment or indictment of a grand jury;[23] the right to a speedy trial;[24] the right to a public trial;[25] the right to a trial by jury;[26] the right to an impartial jury;[27] the right to be informed of the nature and cause of the accusation,[28] the right to confront witnesses,[29] the right to compulsory process for obtaining witnesses;[30] and the right to counsel.[31]

**CUMULATIVE SUPPLEMENT**

**Cases:**

The primary objective of the Fourteenth Amendment was the freedom of African-Americans, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who formerly had exercised unlimited dominion over him. U.S. Const. Amend. 14. Commonwealth v. Long, 485 Mass. 711, 152 N.E.3d 725 (2020).

**[END OF SUPPLEMENT]**



Footnotes

1 U.S. Const. Amends. I to X.

2 Obergefell v. Hodges, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015).

3 United States v. Hano, 922 F.3d 1272 (11th Cir. 2019), cert. denied, 140 S. Ct. 488, 205 L. Ed. 2d 284 (2019).

4 Planned Parenthood of the Heartland v. Reynolds ex rel. State, 915 N.W.2d 206 (Iowa 2018).

5 Obergefell v. Hodges, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015); Planned Parenthood of the Heartland v. Reynolds ex rel. State, 915 N.W.2d 206 (Iowa 2018); Zaatari v. City of Austin, 2019 WL 6336186 (Tex. App. Austin 2019).

6 § 414.

7 Obergefell v. Hodges, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015).

8 West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628, 147 A.L.R. 674 (1943).

9 § 400.

10 §§ 424 to 457.

11 §§ 458 to 553.

12 §§ 554 to 573.

13 Am. Jur. 2d, Weapons and Firearms §§ 4, 5.

14 U.S. Const. Amend. III.

15 Am. Jur. 2d, Searches and Seizures §§ 12 to 15.

16 Am. Jur. 2d, Bail and Recognizance § 87.

17 Am. Jur. 2d, Criminal Law §§ 847 to 850.
18 Am. Jur. 2d, Criminal Law §§ 851 to 879.
19 Am. Jur. 2d, Criminal Law §§ 269 to 375.
20 Am. Jur. 2d, Criminal Law §§ 1005 to 1032.
21 §§ 933 to 937.
22 Am. Jur. 2d, Eminent Domain §§ 6 to 8.
23 Am. Jur. 2d, Indictments and Informations §§ 4 to 10.
24 Am. Jur. 2d, Criminal Law §§ 926 to 929.
25 Am. Jur. 2d, Criminal Law §§ 944 to 947.
26 Am. Jur. 2d, Criminal Law §§ 952 to 958; Am. Jur. 2d, Jury §§ 3 to 11.
27 Am. Jur. 2d, Criminal Law §§ 961 to 965.
28 Am. Jur. 2d, Criminal Law §§ 1144 to 1146.
29 Am. Jur. 2d, Criminal Law §§ 1045 to 1048.
30 Am. Jur. 2d, Criminal Law §§ 1033 to 1035.
31 Am. Jur. 2d, Criminal Law §§ 1073 to 1130.

**End of Document**

# 16A Am. Jur. 2d Constitutional Law § 413

**American Jurisprudence, Second Edition** | May 2021 Update

**Constitutional Law**
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**IX. Fundamental Constitutional Rights and Privileges**

**B. Constitutional Amendments as Source of Fundamental Rights**

## § 413. Federal Bill of Rights as source of fundamental constitutional rights—Unspecified fundamental rights and "penumbra" doctrine

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 1053, 1065, 1067, 1070 to 1071

The specific guarantees in the Bill of Rights to the United States Constitution have "penumbras" or shadows that help give them life and substance,[1] including as fundamental those rights and liberties implicit in the concept of ordered liberty,[2] including the right of privacy,[3] the right to travel,[4] and freedom of association.[5] Both the concept of penumbral guarantees and the Ninth Amendment support the existence of rights not explicitly mentioned in the Constitution.[6] While the Ninth Amendment specifies that the enumeration in the Constitution of certain rights is not be construed to deny or disparage other rights retained by the people,[7] it does not independently create or confer constitutional rights[8] but is, instead, a rule of construction dictating that the full scope of the specific guarantees in the Constitution is not limited by the text.[9] The Tenth Amendment provides that not all of the rights of the people are enumerated and that unspecified powers are reserved to the states or to the people.[10]



Footnotes

1 Griswold v. Connecticut, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965).

2 Planned Parenthood of the Heartland v. Reynolds ex rel. State, 915 N.W.2d 206 (Iowa 2018); State v. Webb, 144 So. 3d 971 (La. 2014).
If a law impinges upon a fundamental right explicitly or implicitly secured by the Constitution, it is presumptively unconstitutional. North Florida Women's Health and Counseling Services, Inc. v. State, 866 So. 2d 612 (Fla. 2003).

3 § 649.

4 § 657.

5 § 578.

6 U.S. v. Criden, 675 F.2d 550 (3d Cir. 1982).

7 U.S. Const. Amend. IX.

8 Phillips v. City of New York, 775 F.3d 538, 313 Ed. Law Rep. 452 (2d Cir. 2015).

9 Alharbi v. Miller, 368 F. Supp. 3d 527, 103 Fed. R. Serv. 3d 384 (E.D. N.Y. 2019).

The Ninth Amendment is a rule of interpretation rather than a source of rights. Goodpaster v. City of Indianapolis, 736 F.3d 1060 (7th Cir. 2013).

10 U.S. Const. Amend. X.

As to the effect of the 10th Amendment generally on the powers of the federal and state governments, see §§ 213, 214.

As to the police power of the federal government by virtue of the 10th Amendment, see § 343.

As to the effect of the 10th Amendment on the powers of Congress with respect to the mode of ratification of amendments to the Constitution, see § 15.

**End of Document**

# 16A Am. Jur. 2d Constitutional Law § 414

**American Jurisprudence, Second Edition** | May 2021 Update

**Constitutional Law**
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**IX. Fundamental Constitutional Rights and Privileges**

**B. Constitutional Amendments as Source of Fundamental Rights**

## § 414. Federal 14th Amendment as source of fundamental constitutional rights

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 1073

The 14th Amendment to the United States Constitution, broadly guaranteeing equal protection of the laws and due process of law[1] limits state power by its inhibitions.[2] Fundamental liberties protected by the Due Process Clause of the 14th Amendment include most of the rights enumerated in the Bill of Rights, and, in addition, these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.[3]

The Due Process Clause requires that state action, through one agency or another, must be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.[4] Its effect to limit the powers of the state and thereby to extend correspondingly the rights of persons safeguarded from abridgment is strikingly illustrated by the doctrine through which fundamental rights, similar in nature to the rights safeguarded from federal abridgment by the first eight amendments, are protected, and in a steadily expanding sphere of extent, from state infringement.[5]

Under the doctrine of "selective incorporation,"[6] a specific provision of the Bill of Rights is made obligatory on the states through or by reason or by virtue of the 14th Amendment or its Due Process Clause.[7] In making a determination as to which provisions of the Bill of Rights are applicable to the states, once it is decided that a particular guarantee of the Bill of Rights is "fundamental to the American scheme of justice," the same constitutional standards apply against both the state and federal governments.[8] Among the guarantees of the Bill of Rights protected by the 14th Amendment are: the First Amendment freedoms of speech, press, religion, assembly, and association, and the right to petition the government;[9] the Third Amendment, prohibiting the quartering of soldiers in private homes without the consent of the owner;[10] the Fourth Amendment protection

  

against unreasonable searches and seizures and requisites as to search warrants;[11] the Fifth Amendment's privilege against self-incrimination;[12] the Double Jeopardy Clause of the Fifth Amendment;[13] the Fifth Amendment's prohibition against taking private property for public use without just compensation;[14] the Sixth Amendment's Confrontation Clause,[15] "Compulsory Process" Clause,[16] "Assistance of Counsel" Clause,[17] right to a speedy trial,[18] public trial,[19] trial by jury in criminal cases,[20] and an impartial jury;[21] and the Eighth Amendment's provision against cruel and unusual punishment[22] and "excessive fines" and "excessive bail" provisions.[23]

The 14th Amendment does not apply to the federal government[24] but is directed at state action,[25] encompassing the conduct of state government officials,[26] whether high or low,[27] or legislative, executive, or judicial,[28] but not private persons or entities outside the parameters of the state action requirement.[29] Neither territories[30] nor the District of Columbia are "states" within the meaning of the 14th Amendment.[31]

**CUMULATIVE SUPPLEMENT**

**Cases:**

The Constitution recognizes a right to familial integrity anchored in the First, Ninth, and Fourteenth Amendments. U.S. Const. Amend. 1, 9, 14. Ashley W. by Next Friend Durnell v. Holcomb, 467 F. Supp. 3d 644 (S.D. Ind. 2020).

**[END OF SUPPLEMENT]**



Footnotes

1 U.S. Const. Amend. XIV.

2 Southern Ry. Co. v. Commonwealth of Virginia ex rel. Shirley, 290 U.S. 190, 54 S. Ct. 148, 78 L. Ed. 260 (1933); Borrell v. Bloomsburg University, 870 F.3d 154, 347 Ed. Law Rep. 64 (3d Cir. 2017), cert. denied, 138 S. Ct. 2028, 201 L. Ed. 2d 279 (2018); Davison v. Randall, 912 F.3d 666 (4th Cir. 2019), as amended on other grounds (Jan. 9, 2019).

3 Obergefell v. Hodges, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015) (same-sex marriage within fundamental rights).

4 Poulos v. State of N.H., 345 U.S. 395, 73 S. Ct. 760, 97 L. Ed. 1105, 30 A.L.R.2d 987 (1953).

5 Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799, 93 A.L.R.2d 733 (1963).

6 Klopfer v. State of N.C., 386 U.S. 213, 87 S. Ct. 988, 18 L. Ed. 2d 1 (1967); Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799, 93 A.L.R.2d 733 (1963).

7 Pointer v. Texas, 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965).

8 Benton v. Maryland, 395 U.S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969).

9 § 417.

10 Griswold v. Connecticut, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965).

11 Bailey v. U.S., 568 U.S. 186, 133 S. Ct. 1031, 185 L. Ed. 2d 19 (2013); Adams v. Springmeyer, 17 F. Supp. 3d 478 (W.D. Pa. 2014).

12 Lockhart v. Nelson, 488 U.S. 33, 109 S. Ct. 285, 102 L. Ed. 2d 265 (1988); Arizona v. Mauro, 481 U.S. 520, 107 S. Ct. 1931, 95 L. Ed. 2d 458 (1987); Allen v. Illinois, 478 U.S. 364, 106 S. Ct. 2988, 92 L. Ed. 2d 296 (1986); Hearts Bluff Game Ranch, Inc. v. State, 381 S.W.3d 468 (Tex. 2012).

13 Lockhart v. Nelson, 488 U.S. 33, 109 S. Ct. 285, 102 L. Ed. 2d 265 (1988); Illinois v. Vitale, 447 U.S. 410, 100 S. Ct. 2260, 65 L. Ed. 2d 228 (1980); Swisher v. Brady, 438 U.S. 204, 98 S. Ct. 2699, 57 L. Ed. 2d 705, 25 Fed. R. Serv. 2d 1463 (1978).

14 Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978); Duncan v. State of La., 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968); Isely v. City of Wichita, 38 Kan. App. 2d 1022, 174 P.3d 919 (2008).

15 Maryland v. Craig, 497 U.S. 836, 110 S. Ct. 3157, 111 L. Ed. 2d 666, 30 Fed. R. Evid. Serv. 1 (1990); Illinois v. Allen, 397 U.S. 337, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970); State v. Simmons, 188 Conn. App. 813, 205 A.3d 569 (2019); State v. Richardson, 156 Idaho 524, 328 P.3d 504 (2014).

16 Taylor v. Illinois, 484 U.S. 400, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988).

17 McCoy v. Court of Appeals of Wisconsin, Dist. 1, 486 U.S. 429, 108 S. Ct. 1895, 100 L. Ed. 2d 440 (1988); State v. Baskins, 260 N.C. App. 589, 818 S.E.2d 381 (2018), writ denied, review denied, 372 N.C. 102, 824 S.E.2d 409 (2019).

As to the right of an accused to the assistance of counsel, generally, see Am. Jur. 2d, Criminal Law §§ 1097 to 1108.

18 Ludwig v. Massachusetts, 427 U.S. 618, 96 S. Ct. 2781, 49 L. Ed. 2d 732 (1976); Barker v. Wingo, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972); Dickey v. Florida, 398 U.S. 30, 90 S. Ct. 1564, 26 L. Ed. 2d 26 (1970); State v. Agostini, 2017-Ohio-4042, 91 N.E.3d 44 (Ohio Ct. App. 12th Dist. Warren County 2017), cause dismissed, 151 Ohio St. 3d 1448, 2017-Ohio-8815, 87 N.E.3d 218 (2017).

19 Gannett Co., Inc. v. DePasquale, 443 U.S. 368, 99 S. Ct. 2898, 61 L. Ed. 2d 608 (1979); Washington v. Texas, 388 U.S. 14, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967).

20 Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 197 L. Ed. 2d 107, 102 Fed. R. Evid. Serv. 1084 (2017).

21 Morgan v. Illinois, 504 U.S. 719, 112 S. Ct. 2222, 119 L. Ed. 2d 492 (1992); Ristaino v. Ross, 424 U.S. 589, 96 S. Ct. 1017, 47 L. Ed. 2d 258 (1976); Taylor v. Louisiana, 419 U.S. 522, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975); Thompson v. Parker, 867 F.3d 641 (6th Cir. 2017), cert. denied, 138 S. Ct. 1594, 200 L. Ed. 2d 780 (2018); Piper v. Young, 2019 SD 65, 936 N.W.2d 793 (S.D. 2019); State v. Schierman, 192 Wash. 2d 577, 438 P.3d 1063 (2018).

22 Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 121 S. Ct. 1678, 149 L. Ed. 2d 674 (2001); Estelle v. Gamble, 429 U.S. 97, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976); Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972); People v. Amezcua and Flores, 6 Cal. 5th 886, 243 Cal. Rptr. 3d 842, 434 P.3d 1121 (Cal. 2019); Bear Cloud v. State, 2014 WY 113, 334 P.3d 132 (Wyo. 2014).

23 Tuilaepa v. California, 512 U.S. 967, 114 S. Ct. 2630, 129 L. Ed. 2d 750 (1994).

24 Life Savers Concepts Association of California v. Wynar, 387 F. Supp. 3d 989 (N.D. Cal. 2019); Nix v. NASA Federal Credit Union, 200 F. Supp. 3d 578 (D. Md. 2016).

25 Jarvis v. Village Gun Shop, Inc., 805 F.3d 1 (1st Cir. 2015); Borrell v. Bloomsburg University, 870 F.3d 154, 347 Ed. Law Rep. 64 (3d Cir. 2017), cert. denied, 138 S. Ct. 2028, 201 L. Ed. 2d 279 (2018); Davison v. Randall, 912 F.3d 666 (4th Cir. 2019), as amended on other grounds (Jan. 9, 2019); State v. Patterson, 170 Conn. App. 768, 156 A.3d 66 (2017).

26 Davison v. Randall, 912 F.3d 666 (4th Cir. 2019), as amended on other grounds (Jan. 9, 2019).

27 U.S. v. Raines, 362 U.S. 17, 80 S. Ct. 519, 4 L. Ed. 2d 524 (1960).

28 Cooper v. Aaron, 358 U.S. 1, 78 S. Ct. 1401, 3 L. Ed. 2d 5, 3 L. Ed. 2d 19, 79 Ohio L. Abs. 452, 79 Ohio L. Abs. 462 (1958).

29 District of Columbia v. Carter, 409 U.S. 418, 93 S. Ct. 602, 34 L. Ed. 2d 613 (1973); Borrell v. Bloomsburg University, 870 F.3d 154, 347 Ed. Law Rep. 64 (3d Cir. 2017), cert. denied, 138 S. Ct. 2028, 201 L. Ed. 2d 279 (2018).

30 District of Columbia v. Carter, 409 U.S. 418, 93 S. Ct. 602, 34 L. Ed. 2d 613 (1973).

31 District of Columbia v. Carter, 409 U.S. 418, 93 S. Ct. 602, 34 L. Ed. 2d 613 (1973); Williams v. District of Columbia, 174 F. Supp. 3d 410 (D.D.C. 2016).

The 14th Amendment does not apply to the District of Columbia because it is a political entity created by the federal government. Leonard v. George Washington University Hospital, 273 F. Supp. 3d 247 (D.D.C. 2017), aff'd, 2018 WL 3524644 (D.C. Cir. 2018), cert. denied, 139 S. Ct. 1339, 203 L. Ed. 2d 603 (2019).

  

End of Document

# 16A Am. Jur. 2d Constitutional Law § 415

**American Jurisprudence, Second Edition** | May 2021 Update

**Constitutional Law**
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**IX. Fundamental Constitutional Rights and Privileges**

**B. Constitutional Amendments as Source of Fundamental Rights**

## § 415. State Bills or Declarations of Rights as source of fundamental constitutional rights

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 1067

A state constitution's bill of rights is inserted in the constitution for the express purpose of operating as a restriction on legislative power,[1] providing citizens with protection from the state's encroachment on the declared rights[2] and protecting the rights of individuals from unwarrantable state action,[3] limiting only state actors,[4] except to the extent that private conduct is state action.[5] The rights found in a state constitution's declaration of rights are fundamental, meaning that the rights are significant components of liberty,[6] but they do not necessarily mirror the Federal Bill of Rights.[7] A right is "fundamental" under a state's constitution if the right either is found in the declaration of rights or is a right without which other constitutionally guaranteed rights would have little meaning.[8]

The United States Supreme Court's application of the United States Constitution establishes a floor below which state courts cannot go to protect individual rights, but states can raise the ceiling to afford greater protections under their own constitutions; a state retains the sovereign right to adopt in its own constitution individual liberties more expansive than those conferred by the Federal Constitution.[9]



Footnotes

1 Hodes & Nauser, MDs, P.A. v. Schmidt, 309 Kan. 610, 440 P.3d 461 (2019).

2 Tully v. City of Wilmington, 370 N.C. 527, 810 S.E.2d 208 (2018).

There is within each provision of a state's Bill of Rights a cluster of essential values which the legislature may qualify but not alienate by material burdens. Burke v. State, 943 N.E.2d 870 (Ind. Ct. App. 2011).

The state declaration of rights erects a wall between the rights declared and the general powers of government, excepting the rights from government powers. 1568 Montgomery Highway, Inc. v. City of Hoover, 45 So. 3d 319 (Ala. 2010).

The state police power is subject to the constitution's declaration of rights. State v. Sieyes, 168 Wash. 2d 276, 225 P.3d 995 (2010).

3 Huval v. State through Department of Public Safety and Corrections, Office of State Police, 222 So. 3d 665 (La. 2017).

4 Fallon v. Mercy Catholic Medical Center of Southeastern Pennsylvania, 200 F. Supp. 3d 553 (E.D. Pa. 2016), aff'd, 877 F.3d 487 (3d Cir. 2017) (Pa. law); McPeters v. LexisNexis, 910 F. Supp. 2d 981 (S.D. Tex. 2012), on reconsideration, 11 F. Supp. 3d 789 (S.D. Tex. 2014) (Tex. law).

5 McPeters v. LexisNexis, 910 F. Supp. 2d 981 (S.D. Tex. 2012), on reconsideration, 11 F. Supp. 3d 789 (S.D. Tex. 2014) (Tex. law).

6 Ramsbacher v. Jim Palmer Trucking, 2018 MT 118, 391 Mont. 298, 417 P.3d 313 (2018).

7 Young v. Red Clay Consolidated School District, 122 A.3d 784, 323 Ed. Law Rep. 328 (Del. Ch. 2015).

8 State v. Riggs, 2005 MT 124, 327 Mont. 196, 113 P.3d 281 (2005).

9 State v. Sieyes, 168 Wash. 2d 276, 225 P.3d 995 (2010).

**End of Document**

# 16A Am. Jur. 2d Constitutional Law IX C Refs.

**American Jurisprudence, Second Edition** | May 2021 Update

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**IX. Fundamental Constitutional Rights and Privileges**

**C. Particular Fundamental Constitutional Rights**

Topic Summary | Correlation Table

## Research References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 795, 825 to 850, 1150 to 1154, 1156, 1157, 1160, 1161, 1163 to 1165, 1170 to 1205, 1290 to 1292, 1295 to 1301, 1303 to 1308, 1310, 1312, 1314 to 1317, 1320 to 1323, 1326, 1328 to 1340(4), 1342 to 1372, 1374 to 1382, 1385 to 1386(2), 1387 to 1389, 1391 to 1393, 1395 to 1399, 1401 to 1403, 1405 to 1410, 1414 to 1420, 1422 to 1427, 1879

**A.L.R. Library**

A.L.R. Index, Assembly of Persons
A.L.R. Index, Constitutional Law
A.L.R. Index, First Amendment
A.L.R. Index, Freedom of Assembly
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A.L.R. Index, Freedom of Expression
A.L.R. Index, Freedom of Religion
A.L.R. Index, Separation of Church and State
West's A.L.R. Digest, Constitutional Law 795, 825 to 850, 1150 to 1154, 1156, 1157, 1160, 1161, 1163 to 1165, 1170 to 1205, 1290 to 1292, 1295 to 1301, 1303 to 1308, 1310, 1312, 1314 to 1317, 1320 to 1323, 1326, 1328 to 1340(4), 1342 to 1372, 1374 to 1382, 1385 to 1386(2), 1387 to 1389, 1391 to 1393, 1395 to 1399, 1401 to 1403, 1405 to 1410, 1414 to 1420, 1422 to 1427, 1879

End of Document

**16A Am. Jur. 2d Constitutional Law § 416**

**American Jurisprudence, Second Edition** | May 2021 Update

**Constitutional Law**
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**IX. Fundamental Constitutional Rights and Privileges**

**C. Particular Fundamental Constitutional Rights**

**1. First Amendment Rights Guaranteed by Constitution**

**a. In General**

# § 416. Nature and purpose of First Amendment constitutional rights

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 1150, 1154

The First Amendment to the United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances."[1] Rights under the First Amendment are fundamental,[2] and the loss of First Amendment freedoms, even for minimal periods of time, constitutes irreparable injury.[3]

The First Amendment was adopted to curtail the power of Congress to interfere with an individual's freedom to believe, to worship, and to express oneself in accordance with the dictates of one's own conscience.[4] The adoption of the First Amendment was to protect unpopular individuals from retaliation—and their ideas from suppression—at the hands of an intolerant society,[5] withdrawing certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal principles to be applied by the courts.[6] The First Amendment is not a majority rule;[7] First Amendment rights are not to be dispensed with or withheld because a court or a legislative body thinks the person or group is unworthy.[8]

At the heart of the First Amendment lies the principle that persons should decide for themselves the ideas and beliefs deserving of expression, consideration, and adherence; government action that stifles speech on account of its message or that requires the utterance of a particular message favored by the government, contravenes this essential right.[9] As a general matter, the

  

First Amendment means that the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.[10] The Constitution demands that content-based restrictions on speech be presumed invalid and that the Government bear the burden of showing their constitutionality.[11]

The First Amendment reflects a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, because speech concerning public affairs is more than self-expression; it is the essence of self-government.[12] Speech on matters of public concern is at the heart of the First Amendment's protection, occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection; it remains protected even when it may stir people to action, move them to tears, or inflict great pain.[13]

While the First Amendment bars the government from dictating what we see or read or speak or hear, freedom of speech has its limits.[14] Fundamental constitutional rights and guarantees, including those in the First Amendment, are not absolute or unrestricted[15] and are subject to reasonable limitation and control.[16] While the First Amendment embodies an overarching commitment to protect speech from government regulation through close judicial scrutiny, thereby enforcing the Constitution's constraints, judicial formulae generally are not to be imposed that are so rigid that they become a straitjacket that disables the government from responding to serious problems.[17]

None of the great liberties insured by the First Amendment can be given higher place than the others.[18] The First Amendment is broad enough to encompass those rights that, while not unambiguously enumerated in the very terms of the amendment, are nonetheless necessary to the enjoyment of other First Amendment rights.[19]



Footnotes

1 U.S. Const. Amend. I.

2 National Association for Advancement of Colored People v. City of Philadelphia, 834 F.3d 435 (3d Cir. 2016); Miles v. City of Edgewater Police Dept./Preferred Governmental Claims Solutions, 190 So. 3d 171 (Fla. 1st DCA 2016).

3 Legend Night Club v. Miller, 637 F.3d 291 (4th Cir. 2011); Doe v. Harris, 772 F.3d 563 (9th Cir. 2014).

4 Wallace v. Jaffree, 472 U.S. 38, 105 S. Ct. 2479, 86 L. Ed. 2d 29, 25 Ed. Law Rep. 39 (1985).

5 McIntyre v. Ohio Elections Com'n, 514 U.S. 334, 115 S. Ct. 1511, 131 L. Ed. 2d 426 (1995).

6 Janus v. American Federation of State, County, and Mun. Employees, Council 31, 138 S. Ct. 2448, 201 L. Ed. 2d 924 (2018).

7 Town of Greece, N.Y. v. Galloway, 572 U.S. 565, 134 S. Ct. 1811, 188 L. Ed. 2d 835 (2014).

8 Lamar Advantage GP Co., LLC v. City of Cincinnati, 114 N.E.3d 805 (Ohio C.P. 2018), subsequent determination, 114 N.E.3d 831 (Ohio C.P. 2018).

9 Turner Broadcasting System, Inc. v. F.C.C., 512 U.S. 622, 114 S. Ct. 2445, 129 L. Ed. 2d 497 (1994).

10 National Institute of Family and Life Advocates v. Becerra, 138 S. Ct. 2361, 201 L. Ed. 2d 835 (2018); Reed v. Town of Gilbert, Ariz., 576 U.S. 155, 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015); U.S. v. Alvarez, 567 U.S. 709, 132 S. Ct. 2537, 183 L. Ed. 2d 574 (2012); Brown v. Entertainment Merchants Ass'n, 564 U.S. 786, 131 S. Ct. 2729, 180 L. Ed. 2d 708 (2011); Nevada Com'n on Ethics v. Carrigan, 564 U.S. 117, 131 S. Ct. 2343, 180 L. Ed. 2d 150 (2011).

11 U.S. v. Alvarez, 567 U.S. 709, 132 S. Ct. 2537, 183 L. Ed. 2d 574 (2012).

12 Snyder v. Phelps, 562 U.S. 443, 131 S. Ct. 1207, 179 L. Ed. 2d 172 (2011).

13 Snyder v. Phelps, 562 U.S. 443, 131 S. Ct. 1207, 179 L. Ed. 2d 172 (2011).

14 Ashcroft v. Free Speech Coalition, 535 U.S. 234, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002).

15 Preminger v. Peake, 552 F.3d 757 (9th Cir. 2008); In re J.M., 36 Cal. App. 5th 668, 249 Cal. Rptr. 3d 83, 367 Ed. Law Rep. 1033 (5th Dist. 2019); Turner v. Commonwealth, 67 Va. App. 46, 792 S.E.2d 299 (2016).

16 In re Attorney General's "Directive on Exit Polling: Media and Non-Partisan Public Interest Groups," issued July 18, 2007, 200 N.J. 283, 981 A.2d 64 (2009).

17 Denver Area Educational Telecommunications Consortium, Inc. v. F.C.C., 518 U.S. 727, 116 S. Ct. 2374, 135 L. Ed. 2d 888 (1996).

18 D'Angelo v. School Bd. of Polk County, Fla., 497 F.3d 1203, 223 Ed. Law Rep. 598 (11th Cir. 2007).

19 Oahu Publications Inc. v. Ahn, 133 Haw. 482, 331 P.3d 460 (2014), as corrected (Aug. 5, 2014).

End of Document

**16A Am. Jur. 2d Constitutional Law § 417**

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**IX. Fundamental Constitutional Rights and Privileges**

**C. Particular Fundamental Constitutional Rights**

**1. First Amendment Rights Guaranteed by Constitution**

**a. In General**

# § 417. Federal and state action subject to First Amendment constitutional rights

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 1151

The First Amendment, standing alone, is an inhibition to Congress only and not the states,[1] but the 14th Amendment extends many of the limitations contained in the Bill of Rights to the states,[2] including, specifically, the First Amendment guarantees[3] relating to religion,[4] speech,[5] press,[6] assembly,[7] petition for redress of grievances,[8] and association.[9]

The First Amendment erects a shield exclusively against governmental[10] or state action,[11] and does not have any effect on the conduct of private persons or entities[12] or private action,[13] unless the private actor exercises a function traditionally exclusively reserved to the state[14] or engages in conduct fairly attributable to the state.[15]



Footnotes

1 Barenblatt v. U.S., 360 U.S. 109, 79 S. Ct. 1081, 3 L. Ed. 2d 1115 (1959).

2 § 414.

3 Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976); Bigelow v. Virginia, 421 U.S. 809, 95 S. Ct. 2222, 44 L. Ed. 2d 600 (1975); Cooper

v. U.S. Postal Service, 577 F.3d 479 (2d Cir. 2009); Rojas v. City of Ocala, 315 F. Supp. 3d 1256 (M.D. Fla. 2018); DeBruin v. St. Patrick Congregation, 2012 WI 94, 343 Wis. 2d 83, 816 N.W.2d 878 (2012).

4 Sloan v. Lemon, 413 U.S. 825, 93 S. Ct. 2982, 37 L. Ed. 2d 939 (1973); Committee For Public Ed. and Religious Liberty v. Nyquist, 413 U.S. 756, 93 S. Ct. 2955, 37 L. Ed. 2d 948 (1973); Cornerstone Christian Schools v. University Interscholastic League, 563 F.3d 127, 243 Ed. Law Rep. 609 (5th Cir. 2009).

5 Manhattan Community Access Corporation v. Halleck, 139 S. Ct. 1921, 204 L. Ed. 2d 405 (2019).

6 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 116 S. Ct. 1495, 134 L. Ed. 2d 711 (1996); Bates v. State Bar of Arizona, 433 U.S. 350, 97 S. Ct. 2691, 53 L. Ed. 2d 810 (1977).

7 United Mine Workers of America, Dist. 12 v. Illinois State Bar Ass'n, 389 U.S. 217, 88 S. Ct. 353, 19 L. Ed. 2d 426 (1967).

8 United Mine Workers of America, Dist. 12 v. Illinois State Bar Ass'n, 389 U.S. 217, 88 S. Ct. 353, 19 L. Ed. 2d 426 (1967).

9 Marchioro v. Chaney, 442 U.S. 191, 99 S. Ct. 2243, 60 L. Ed. 2d 816 (1979); Baird v. State Bar of Ariz., 401 U.S. 1, 91 S. Ct. 702, 27 L. Ed. 2d 639 (1971).

10 In re: Motor Fuel Temperature Sales Practices Litigation, 872 F.3d 1094, 98 Fed. R. Serv. 3d 936 (10th Cir. 2017), cert. denied, 138 S. Ct. 1299, 200 L. Ed. 2d 502 (2018); Carter v. Transport Workers Union of America Local 556, 353 F. Supp. 3d 556 (N.D. Tex. 2019).

11 Manhattan Community Access Corporation v. Halleck, 139 S. Ct. 1921, 204 L. Ed. 2d 405 (2019); Schumann v. Dianon Systems, Inc., 304 Conn. 585, 43 A.3d 111 (2012).

12 Manhattan Community Access Corporation v. Halleck, 139 S. Ct. 1921, 204 L. Ed. 2d 405 (2019); Johnson v. Commission on Presidential Debates, 202 F. Supp. 3d 159 (D.D.C. 2016), judgment aff'd, 869 F.3d 976 (D.C. Cir. 2017), cert. denied, 138 S. Ct. 1012, 200 L. Ed. 2d 256 (2018).

The First Amendment, via the 14th Amendment, does not apply to purely private conduct. DeBruin v. St. Patrick Congregation, 2012 WI 94, 343 Wis. 2d 83, 816 N.W.2d 878 (2012).

13 In re: Motor Fuel Temperature Sales Practices Litigation, 872 F.3d 1094, 98 Fed. R. Serv. 3d 936 (10th Cir. 2017), cert. denied, 138 S. Ct. 1299, 200 L. Ed. 2d 502 (2018).

14 Manhattan Community Access Corporation v. Halleck, 139 S. Ct. 1921, 204 L. Ed. 2d 405 (2019).

15 American Atheists, Inc. v. Port Authority of NY and NJ, 936 F. Supp. 2d 321 (S.D. N.Y. 2013), aff'd, 760 F.3d 227 (2d Cir. 2014).

End of Document

**16A Am. Jur. 2d Constitutional Law § 418**

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**IX. Fundamental Constitutional Rights and Privileges**

**C. Particular Fundamental Constitutional Rights**

**1. First Amendment Rights Guaranteed by Constitution**

**a. In General**

# § 418. Strict or intermediate scrutiny under First Amendment constitutional rights

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 1156, 1157

First Amendment rights are fundamental constitutional rights[1] subject to a standard of strict scrutiny[2] or intermediate scrutiny in challenges to government action as infringing on those rights.[3]

Strict scrutiny applies to a First Amendment challenge to the constitutionality of a statute based on its content.[4] Under the strict scrutiny standard of review applicable to some First Amendment claims, the challenged government action must be narrowly tailored to promote a compelling government interest, and must use the least restrictive means to achieve its ends.[5]

Under an intermediate scrutiny review of the constitutionality of a content neutral statute under the First Amendment,[6] there must be a substantial relation between an important government interest and the restriction or infringement; the touchstone is whether there is a fit between the chosen means and the purported ends that is not necessarily perfect, but reasonable.[7] The court's task in deciding whether an asserted government interest is sufficiently important, as required for a state law to survive intermediate First Amendment scrutiny, is to determine whether the strength of asserted governmental interest reflects seriousness of the actual burden on First Amendment rights.[8] In determining whether a statute is narrowly tailored to a significant governmental interest to satisfy intermediate scrutiny for a First Amendment challenge, the incidental restriction on the alleged First Amendment freedoms must be no greater than is essential to the furtherance of that interest.[9] Intermediate scrutiny requires only a reasonable fit between the challenged regulation and the state's interest,[10] not the least restrictive means.[11] Narrow

  

tailoring required by intermediate scrutiny under the First Amendment requires a "fit" between the legislature's ends and the means chosen to accomplish those ends.[12] The state is not required to show the law is the least restrictive means available to meet the state's interests, nor that the interests are compelling.[13]

**CUMULATIVE SUPPLEMENT**

**Cases:**

In order for statute to serve a compelling governmental interest, as required for it to survive strict scrutiny under the First Amendment, the problem that it is designed to solve must be paramount and of vital importance. U.S. Const. Amend. 1. State v. Casillas, 952 N.W.2d 629 (Minn. 2020).

**[END OF SUPPLEMENT]**



Footnotes

1 § 416.

2 Washington Post v. McManus, 944 F.3d 506 (4th Cir. 2019); Ex parte Odom, 570 S.W.3d 900 (Tex. App. Houston 1st Dist. 2018), petition for discretionary review refused, (Aug. 21, 2019); State v. Culver, 2018 WI App 55, 384 Wis. 2d 222, 918 N.W.2d 103 (Ct. App. 2018), review denied, 2019 WI 8, 385 Wis. 2d 206, 923 N.W.2d 165 (2018).

3 Capital Associated Industries, Incorporated v. Stein, 922 F.3d 198 (4th Cir. 2019), cert. denied, 140 S. Ct. 666, 205 L. Ed. 2d 438 (2019); National Association of African American-Owned Media v. Charter Communications, Inc., 915 F.3d 617 (9th Cir. 2019); Ex parte Odom, 570 S.W.3d 900 (Tex. App. Houston 1st Dist. 2018), petition for discretionary review refused, (Aug. 21, 2019).

4 Ex parte Odom, 570 S.W.3d 900 (Tex. App. Houston 1st Dist. 2018), petition for discretionary review refused, (Aug. 21, 2019).

5 Evergreen Ass'n, Inc. v. City of New York, 740 F.3d 233 (2d Cir. 2014); American Civil Liberties Union v. Ashcroft, 322 F.3d 240 (3d Cir. 2003), aff'd and remanded on other grounds, 542 U.S. 656, 124 S. Ct. 2783, 159 L. Ed. 2d 690 (2004); Miles v. City of Edgewater Police Dept./Preferred Governmental Claims Solutions, 190 So. 3d 171 (Fla. 1st DCA 2016); State v. Culver, 2018 WI App 55, 384 Wis. 2d 222, 918 N.W.2d 103 (Ct. App. 2018), review denied, 2019 WI 8, 385 Wis. 2d 206, 923 N.W.2d 165 (2018).

6 National Association of African American-Owned Media v. Charter Communications, Inc., 915 F.3d 617 (9th Cir. 2019); Ex parte Odom, 570 S.W.3d 900 (Tex. App. Houston 1st Dist. 2018), petition for discretionary review refused, (Aug. 21, 2019).

7 Washington Post v. McManus, 944 F.3d 506 (4th Cir. 2019).

8 Calzone v. Summers, 942 F.3d 415 (8th Cir. 2019); Center for Competitive Politics v. Harris, 784 F.3d 1307 (9th Cir. 2015).

9 National Association of African American-Owned Media v. Charter Communications, Inc., 915 F.3d 617 (9th Cir. 2019).

10 Capital Associated Industries, Incorporated v. Stein, 922 F.3d 198 (4th Cir. 2019), cert. denied, 140 S. Ct. 666, 205 L. Ed. 2d 438 (2019).

11 Capital Associated Industries, Incorporated v. Stein, 922 F.3d 198 (4th Cir. 2019), cert. denied, 140 S. Ct. 666, 205 L. Ed. 2d 438 (2019); Minority Television Project, Inc. v. F.C.C., 736 F.3d 1192 (9th Cir. 2013).

12 Minority Television Project, Inc. v. F.C.C., 736 F.3d 1192 (9th Cir. 2013).

13 Harrison Hills Teachers Assn. v. State Emp. Relations Bd., 2016-Ohio-4661, 56 N.E.3d 986 (Ohio Ct. App. 7th Dist. Harrison County 2016).

End of Document

**16A Am. Jur. 2d Constitutional Law § 419**

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**IX. Fundamental Constitutional Rights and Privileges**

**C. Particular Fundamental Constitutional Rights**

**1. First Amendment Rights Guaranteed by Constitution**

**a. In General**

# § 419. Facial and as-applied challenges under First Amendment constitutional rights

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 1152, 1153

Two types of First Amendment challenges can be brought in relation to challenged government action: facial,[1] and as-applied.[2] Under the First Amendment, a facial challenge considers a restriction's application to all conceivable parties, while an as-applied challenge tests the application of that restriction to the facts of a plaintiff's concrete case.[3] A court considering a facial First Amendment challenge is to assess the constitutionality of the challenged law without regard to its impact on the plaintiff asserting the facial challenge; in contrast, an as-applied challenge is based on a developed factual record and the application of a statute to a specific person.[4] The same substantive First Amendment standard applies to both,[5] as the distinction lies in the breadth of the remedy employed by the court.[6]

Facial challenges to the validity of legislation are disfavored generally and in First Amendment cases,[7] but the preference for as-applied challenges may be relaxed in a First Amendment context.[8]

In the First Amendment context, a party bringing a facial challenge need show only that a substantial number of a law's applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.[9] A restriction on First Amendment freedoms is unconstitutional on its face if no set of circumstances exists under which the restriction would be valid.[10] When evaluating a facial First Amendment challenge, the courts may examine not only the text of the law but also any binding judicial or administrative construction of it, and the court is required to consider the well-established practice of the authority enforcing

  

the law.[11] Moreover, in appraising a statute's inhibitory effect on First Amendment rights, the courts will not hesitate to take into account the possible applications of the statute in other factual contexts besides the one being specifically considered.[12]

An as-applied First Amendment challenge consists of a challenge to a statute's application only, as applied to the party before the court; if an as-applied challenge is successful, the statute may not be applied to the challenger, but is otherwise enforceable.[13] To prevail on an as-applied First Amendment challenge, the plaintiffs must show that the government action is unconstitutional as applied to the plaintiffs' particular activity.[14] The caveat that First Amendment issues require a case-by-case analysis of the facts is especially true with regard to as-applied challenges.[15]



Footnotes

1 U.S. v. Stevens, 559 U.S. 460, 130 S. Ct. 1577, 176 L. Ed. 2d 435 (2010); Speech First, Inc. v. Schlissel, 939 F.3d 756, 370 Ed. Law Rep. 53 (6th Cir. 2019); United States of America v. Sineneng-Smith, 910 F.3d 461 (9th Cir. 2018), for additional opinion, see, 744 Fed. Appx. 498 (9th Cir. 2018) and cert. granted, 140 S. Ct. 36, 204 L. Ed. 2d 1194 (2019); People v. Helms, 2016 COA 90, 396 P.3d 1133 (Colo. App. 2016); State v. Final Exit Network, Inc., 889 N.W.2d 296 (Minn. Ct. App. 2016).

2 Speech First, Inc. v. Schlissel, 939 F.3d 756, 370 Ed. Law Rep. 53 (6th Cir. 2019); Phelps-Roper v. Ricketts, 867 F.3d 883 (8th Cir. 2017); iMatter Utah v. Njord, 774 F.3d 1258 (10th Cir. 2014); Pursuing America's Greatness v. Federal Election Commission, 831 F.3d 500 (D.C. Cir. 2016); State v. Final Exit Network, Inc., 889 N.W.2d 296 (Minn. Ct. App. 2016).

3 iMatter Utah v. Njord, 774 F.3d 1258 (10th Cir. 2014).

4 Educational Media Co. at Virginia Tech, Inc. v. Insley, 731 F.3d 291 (4th Cir. 2013).

5 Pursuing America's Greatness v. Federal Election Commission, 831 F.3d 500 (D.C. Cir. 2016); State v. Final Exit Network, Inc., 889 N.W.2d 296 (Minn. Ct. App. 2016).

6 Edwards v. District of Columbia, 755 F.3d 996 (D.C. Cir. 2014).

7 Josephine Havlak Photographer, Inc. v. Village of Twin Oaks, 864 F.3d 905 (8th Cir. 2017), cert. denied, 138 S. Ct. 986, 200 L. Ed. 2d 250 (2018).

8 Speech First, Inc. v. Schlissel, 939 F.3d 756, 370 Ed. Law Rep. 53 (6th Cir. 2019); United States of America v. Sineneng-Smith, 910 F.3d 461 (9th Cir. 2018), for additional opinion, see, 744 Fed. Appx. 498 (9th Cir. 2018) and cert. granted, 140 S. Ct. 36, 204 L. Ed. 2d 1194 (2019).

9 U.S. v. Stevens, 559 U.S. 460, 130 S. Ct. 1577, 176 L. Ed. 2d 435 (2010); Missourians for Fiscal Accountability v. Klahr, 892 F.3d 944 (8th Cir. 2018); Knox v. Brnovich, 907 F.3d 1167 (9th Cir. 2018); Edwards v. District of Columbia, 755 F.3d 996 (D.C. Cir. 2014).

10 Free and Fair Election Fund v. Missouri Ethics Commission, 903 F.3d 759 (8th Cir. 2018), cert. denied, 139 S. Ct. 1601, 203 L. Ed. 2d 755 (2019).

11 Field Day, LLC v. County of Suffolk, 463 F.3d 167 (2d Cir. 2006); Santa Monica Food Not Bombs v. City of Santa Monica, 450 F.3d 1022 (9th Cir. 2006).

12 Bigelow v. Virginia, 421 U.S. 809, 95 S. Ct. 2222, 44 L. Ed. 2d 600 (1975).

13 Phelps-Roper v. Ricketts, 867 F.3d 883 (8th Cir. 2017).

14 Edwards v. District of Columbia, 755 F.3d 996 (D.C. Cir. 2014).

15 Phelps-Roper v. Ricketts, 867 F.3d 883 (8th Cir. 2017).

End of Document

# 16A Am. Jur. 2d Constitutional Law § 420

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**IX. Fundamental Constitutional Rights and Privileges**

**C. Particular Fundamental Constitutional Rights**

**1. First Amendment Rights Guaranteed by Constitution**

**a. In General**

## § 420. Vagueness challenges under First Amendment constitutional rights

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 795, 1160, 1161

The "vagueness" doctrine, as the basis of a challenge under the First Amendment, is an outgrowth not of the First Amendment, but of the Due Process Clause of the Fifth Amendment[1] and the 14th Amendment.[2] Vagueness raises special First Amendment concerns for its chilling effect on the exercise of First Amendment freedoms.[3] If a vague statute impacts First Amendment rights, it can deter people from exercising those rights, since uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked.[4] Reasonable certainty in statutes is more essential than usual when vagueness might induce individuals to forgo their First Amendment rights for fear of violating an unclear law.[5]

The standard for unconstitutional vagueness under the First Amendment is whether the statute provides a person of ordinary intelligence fair notice of what is prohibited or authorizes or encourages seriously discriminatory enforcement.[6] Even if an enactment does not reach a substantial amount of constitutionally protected conduct, for purposes of an overbreadth analysis,[7] it may be impermissibly vague because it fails to establish standards for the police and the public that are sufficient to guard against the arbitrary deprivation of liberty interests.[8] What renders a statute "vague" is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved but rather the indeterminacy of precisely what that fact is.[9]

  

A court will consider a law's facial vagueness if it threatens First Amendment interests,[10] and, in the First Amendment context, a challenger may mount a facial vagueness attack on a statute even if its meaning is plain as applied to the challenger's own conduct.[11] The bar against vagueness challenges by those whose conduct the law clearly proscribes is relaxed in the First Amendment context.[12] The doctrine of vagueness provides an exception to the traditional rules of standing and allows parties not yet affected by a statute to bring actions under the First Amendment based on a belief that a policy is so unclear that it will have a chilling effect.[13]

A statute which, on its face, and as authoritatively construed, is so vague as to permit the punishment of the fair use of the opportunity of free political discussion is repugnant to the guarantee of liberty contained in the 14th Amendment.[14] A facial vagueness challenge under the First Amendment will be denied so long as it is clear what the statute proscribes in the vast majority of its intended applications.[15] A claim that First Amendment rights are at issue under an as-applied vagueness challenge, permits the court to examine the challenge only under the facts of the particular case and decide whether, under a reasonable construction of the statute, the conduct in question is prohibited.[16] An as-applied challenge for vagueness under the First Amendment will not be successful when raised by someone to whose conduct the statute clearly applies.[17]

Vague laws in any area suffer a constitutional infirmity, but when First Amendment rights are involved, the United States Supreme Court looks even more closely lest, under the guise of regulating conduct that is reachable by the police power, a First Amendment freedom suffers; such a law must be narrowly drawn to prevent the supposed evil.[18] Because First Amendment freedoms need breathing space to survive, the government may regulate in the area only with narrow specificity.[19] In a vagueness challenge in the First Amendment context, heightened[20] or stricter standards apply,[21] as in a challenge to a statute having a potentially inhibiting effect on speech.[22] Precision of regulation must be the touchstone in an area so closely involving our most precious freedoms.[23] Since standards of permissible statutory vagueness are strict in the area of free expression, the courts will not assume that an ambiguous line between permitted and prohibited activities curtails constitutionally protected activity as little as possible or that in subsequent enforcement of the statute ambiguities will be resolved in favor of adequate protection of First Amendment rights.[24]

Speculation and hyper-technical theories as to what a statute covers cannot create vagueness in violation of the First Amendment, especially when the statute is surely valid in the vast majority of its intended applications.[25] The criteria to evaluate language challenged under the First Amendment on vagueness grounds is that of flexibility and reasonable breadth, rather than meticulous specificity or mathematical certainty; these standards should not be mechanically applied, but rather should be considered in light of the nature of the enactment.[26] Perfect clarity and precise guidance are not required, if the statute conveys a sufficiently definite warning when measured by common understanding and practices.[27]

## CUMULATIVE SUPPLEMENT

**Cases:**

The twin concerns of the due process vagueness doctrine of inadequate notice and arbitrary or discriminatory enforcement are especially pronounced where a vague statute abuts upon sensitive areas of basic First Amendment freedoms, because ambiguity inevitably leads citizens to steer far wider of the unlawful zone than if the boundaries were clearly marked, thereby chilling protected speech. U.S. Const. Amends. 1, 5. United States v. Miselis, 972 F.3d 518 (4th Cir. 2020).

  

**[END OF SUPPLEMENT]**



Footnotes

1 U.S. v. Williams, 553 U.S. 285, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (2008).

2 Baggett v. Bullitt, 377 U.S. 360, 84 S. Ct. 1316, 12 L. Ed. 2d 377 (1964).

3 Reno v. American Civil Liberties Union, 521 U.S. 844, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997); Bell v. Keating, 697 F.3d 445 (7th Cir. 2012); Knox v. Brnovich, 336 F. Supp. 3d 1063 (D. Ariz. 2018), aff'd, 907 F.3d 1167 (9th Cir. 2018).

4 600 Marshall Entertainment Concepts, LLC v. City of Memphis, 705 F.3d 576 (6th Cir. 2013).

5 Scull v. Com. of Va. ex rel. Committee on Law Reform and Racial Activities, 359 U.S. 344, 79 S. Ct. 838, 3 L. Ed. 2d 865 (1959).

6 U.S. v. Williams, 553 U.S. 285, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (2008); United States v. Gonzalez, 905 F.3d 165, 107 Fed. R. Evid. Serv. 459 (3d Cir. 2018), cert. denied, 139 S. Ct. 2727, 204 L. Ed. 2d 1120 (2019); Town of Delaware v. Leifer, 34 N.Y.3d 234, 116 N.Y.S.3d 630, 139 N.E.3d 1210 (2019).
In prohibiting overly vague laws, the vagueness doctrine seeks to ensure that persons of ordinary intelligence have "fair warning" of what a law prohibits, prevent arbitrary and discriminatory enforcement of laws by requiring that they provide explicit standards for those who apply them, and, in cases where the statute abuts upon sensitive areas of basic First Amendment freedoms, avoid chilling the exercise of First Amendment rights. National Organization for Marriage v. McKee, 649 F.3d 34 (1st Cir. 2011).

7 § 421.

8 City of Chicago v. Morales, 527 U.S. 41, 119 S. Ct. 1849, 144 L. Ed. 2d 67, 72 A.L.R.5th 665 (1999).
In the First Amendment context, vagueness and overbreadth are two sides of the same coin, and the two sorts of challenges are often conceived of as alternative and often overlapping theories for relief on the same claim. Center for Individual Freedom v. Madigan, 697 F.3d 464 (7th Cir. 2012).

9 U.S. v. Williams, 553 U.S. 285, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (2008).

10 Bell v. Keating, 697 F.3d 445 (7th Cir. 2012); U.S. v. Rodebaugh, 798 F.3d 1281 (10th Cir. 2015); Lebo v. State, 474 S.W.3d 402 (Tex. App. San Antonio 2015), petition for discretionary review refused, (Feb. 3, 2016).

11 Griffin v. Secretary of Veterans Affairs, 288 F.3d 1309 (Fed. Cir. 2002); McMillian v. State, 388 S.W.3d 866 (Tex. App. Houston 14th Dist. 2012).

12 National Organization for Marriage v. McKee, 649 F.3d 34 (1st Cir. 2011).

13 Savage v. Gee, 665 F.3d 732, 275 Ed. Law Rep. 570 (6th Cir. 2012).

14 Cox v. State of Louisiana, 379 U.S. 536, 85 S. Ct. 466, 13 L. Ed. 2d 487 (1965); Edwards v. South Carolina, 372 U.S. 229, 83 S. Ct. 680, 9 L. Ed. 2d 697 (1963).

15 ArchitectureArt, LLC v. City of San Diego, 231 F. Supp. 3d 828 (S.D. Cal. 2017), aff'd, 745 Fed. Appx. 37 (9th Cir. 2018).

16 U.S. v. Agront, 773 F.3d 192 (9th Cir. 2014).

17 ArchitectureArt, LLC v. City of San Diego, 231 F. Supp. 3d 828 (S.D. Cal. 2017), aff'd, 745 Fed. Appx. 37 (9th Cir. 2018).

18 Ashton v. Kentucky, 384 U.S. 195, 86 S. Ct. 1407, 16 L. Ed. 2d 469 (1966).

19 Gooding v. Wilson, 405 U.S. 518, 92 S. Ct. 1103, 31 L. Ed. 2d 408 (1972); National Ass'n for Advancement of Colored People v. Button, 371 U.S. 415, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963).

20 Jones v. DeSantis, 410 F. Supp. 3d 1284 (N.D. Fla. 2019), aff'd, 950 F.3d 795 (11th Cir. 2020).

21 Doctor John's, Inc. v. City of Roy, 465 F.3d 1150 (10th Cir. 2006); Bloomberg v. New York City Department of Education, 410 F. Supp. 3d 608, 373 Ed. Law Rep. 168 (S.D. N.Y. 2019); State v. Green Mountain Future, 194 Vt. 625, 2013 VT 87, 86 A.3d 981 (2013).

22 Keyishian v. Board of Regents of University of State of N. Y., 385 U.S. 589, 87 S. Ct. 675, 17 L. Ed. 2d 629 (1967); National Ass'n for Advancement of Colored People v. Button, 371 U.S. 415, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963); G.K. Ltd. Travel v. City of Lake Oswego, 436 F.3d 1064 (9th Cir. 2006).

Greater specificity is required of a statute abutting sensitive First Amendment concerns. Wagner v. State, 539 S.W.3d 298 (Tex. Crim. App. 2018).

23 Keyishian v. Board of Regents of University of State of N. Y., 385 U.S. 589, 87 S. Ct. 675, 17 L. Ed. 2d 629 (1967).

24 National Ass'n for Advancement of Colored People v. Button, 371 U.S. 415, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963).

25 Faustin v. City and County of Denver, Colo., 423 F.3d 1192 (10th Cir. 2005).

26 Eliason v. City of Rapid City, 306 F. Supp. 3d 1131 (D.S.D. 2018).

27 Wagner v. State, 539 S.W.3d 298 (Tex. Crim. App. 2018).

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**16A Am. Jur. 2d Constitutional Law § 421**

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**IX. Fundamental Constitutional Rights and Privileges**

**C. Particular Fundamental Constitutional Rights**

**1. First Amendment Rights Guaranteed by Constitution**

**a. In General**

# § 421. Overbreadth challenges under First Amendment constitutional rights

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 795, 1163 to 1165

"Overbreadth" is a judicially created doctrine designed to prevent the chilling of protected First Amendment rights[1] and is generally limited to the First Amendment context.[2] The doctrine of overbreadth derives from the recognition that an unconstitutional restriction of protected First Amendment rights may deter the exercise of those rights by parties not before the court and thereby escape judicial review.[3]

Overbreadth may render void legislation which is lacking neither in clarity nor precision,[4] while the vagueness doctrine is applicable solely to legislation which is lacking in clarity and precision,[5] although, in some cases, legislation has been struck down on the grounds of both overbreadth and vagueness.[6]

**Practice Tip:**

Overbreadth First Amendment challenges are an exception to the general rule against third-party standing[7] but not Article III standing.[8] A challenger is permitted to raise unconstitutional overbreadth as applied to other persons in situations not before the court, even if not overbroad as applied to the challenger.[9] In other words, traditional rules of standing are altered to permit First

  

Amendment overbreadth attacks without requiring that the person making the attack demonstrate that the statute is deficiently specific in relation to the person's own conduct.[10] Standing to challenge a statute on First Amendment grounds as facially overbroad does not depend on whether the challenger's own activity is shown to be constitutionally privileged;[11] even a person whose activity is clearly not protected may challenge a law as overbroad under the First Amendment.[12] In the First Amendment context, plaintiffs may argue that the statute is overbroad because it is unclear whether it substantially regulates a protected freedom.[13]

All First Amendment overbreadth challenges are facial challenges,[14] in the sense that, while litigants are permitted to raise both as-applied and overbreadth challenges in First Amendment cases, the lawfulness of the particular application of the law should ordinarily be decided first; generally, a court proceeds to an overbreadth issue only if it is determined that the statute would be valid as applied.[15] A plaintiff who has established constitutional injury under a provision of a statute as applied to the plaintiff's set of facts may also bring a facial challenge, under the First Amendment overbreadth doctrine, in order to vindicate the rights of others not before the court under that provision.[16]



Footnotes

1 Massachusetts v. Oakes, 491 U.S. 576, 109 S. Ct. 2633, 105 L. Ed. 2d 493 (1989).

2 Kachalsky v. County of Westchester, 701 F.3d 81 (2d Cir. 2012).

3 Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York, 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980); United States v. Thompson, 896 F.3d 155 (2d Cir. 2018), cert. denied, 139 S. Ct. 2715, 204 L. Ed. 2d 1113 (2019).
The First Amendment doctrine of substantial overbreadth is predicated on the danger that an overly broad statute, if left in place, may cause persons whose expression is constitutionally protected to refrain from exercising their rights for fear of criminal sanctions. Com. v. Jones, 471 Mass. 138, 28 N.E.3d 391 (2015).

4 Grayned v. City of Rockford, 408 U.S. 104, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972); Cameron v. Johnson, 390 U.S. 611, 88 S. Ct. 1335, 20 L. Ed. 2d 182 (1968).

5 § 420.

6 Plummer v. City of Columbus, Ohio, 414 U.S. 2, 94 S. Ct. 17, 38 L. Ed. 2d 3 (1973); Coates v. City of Cincinnati, 402 U.S. 611, 91 S. Ct. 1686, 29 L. Ed. 2d 214 (1971); Keyishian v. Board of Regents of University of State of N. Y., 385 U.S. 589, 87 S. Ct. 675, 17 L. Ed. 2d 629 (1967).

7 United States v. Smith, 945 F.3d 729 (2d Cir. 2019); National Federation of the Blind of Texas, Inc. v. Abbott, 647 F.3d 202 (5th Cir. 2011); Willson v. City of Bel-Nor, Missouri, 924 F.3d 995 (8th Cir. 2019).

8 United States v. Smith, 945 F.3d 729 (2d Cir. 2019).
Article III standing retains rigor even in an overbreadth claim under the First Amendment. National Federation of the Blind of Texas, Inc. v. Abbott, 647 F.3d 202 (5th Cir. 2011).
The First Amendment overbreadth doctrine speaks to whose interests a plaintiff suffering Article III injury may represent; it does not provide a reason to find such injury where none is present or imminently threatened in the first instance. Hedges v. Obama, 724 F.3d 170 (2d Cir. 2013).

9 Board of Airport Com'rs of City of Los Angeles v. Jews for Jesus, Inc., 482 U.S. 569, 107 S. Ct. 2568, 96 L. Ed. 2d 500 (1987); Doran v. Salem Inn, Inc., 422 U.S. 922, 95 S. Ct. 2561, 45 L. Ed. 2d 648 (1975); United States v. Smith, 945 F.3d 729 (2d Cir. 2019); Willson v. City of Bel-Nor, Missouri, 924 F.3d 995 (8th Cir. 2019); State v. Dawley, 455 P.3d 205 (Wash. Ct. App. Div. 1 2019).
The rationale of the overbreadth doctrine under the First Amendment is to protect the expressive rights of third parties who are not before the court. Doe I v. Landry, 909 F.3d 99 (5th Cir. 2018).

10 Los Angeles Police Dept. v. United Reporting Pub. Corp., 528 U.S. 32, 120 S. Ct. 483, 145 L. Ed. 2d 451 (1999); Bigelow v. Virginia, 421 U.S. 809, 95 S. Ct. 2222, 44 L. Ed. 2d 600 (1975).

11 Bigelow v. Virginia, 421 U.S. 809, 95 S. Ct. 2222, 44 L. Ed. 2d 600 (1975).

12 United States of America v. Sineneng-Smith, 910 F.3d 461 (9th Cir. 2018), for additional opinion, see, 744 Fed. Appx. 498 (9th Cir. 2018) and cert. granted, 140 S. Ct. 36, 204 L. Ed. 2d 1194 (2019).

13 U.S. v. Williams, 553 U.S. 285, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (2008).
The same rule applies to corporations and other entities. Board of Airport Com'rs of City of Los Angeles v. Jews for Jesus, Inc., 482 U.S. 569, 107 S. Ct. 2568, 96 L. Ed. 2d 500 (1987); Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 100 S. Ct. 826, 63 L. Ed. 2d 73 (1980).

14 United States v. Smith, 945 F.3d 729 (2d Cir. 2019).

15 Serafine v. Branaman, 810 F.3d 354 (5th Cir. 2016).

16 Sabri v. Whittier Alliance, 833 F.3d 995 (8th Cir. 2016).

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**IX. Fundamental Constitutional Rights and Privileges**

**C. Particular Fundamental Constitutional Rights**

**1. First Amendment Rights Guaranteed by Constitution**

**a. In General**

# § 422. Overbreadth challenges under First Amendment constitutional rights—Tests for overbreadth

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 1163 to 1165

In the First Amendment context, the overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when judged in relation to the statute's plainly legitimate sweep.[1] The overbreadth claimant must demonstrate, from the text of the law and from actual fact, that substantial overbreadth exists,[2] meaning that a substantial number of instances exist in which the law cannot be applied without violating the First Amendment,[3] as when a substantial number of its applications are unconstitutional,[4] or the law prohibits a substantial amount of protected expression.[5] The overbreadth must be substantial not only in an absolute sense but also relative to the scope of the law's plainly legitimate applications.[6] There must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the court for it to be facially challenged on overbreadth grounds.[7] The mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge.[8] A plaintiff may not leverage a few alleged unconstitutional applications of the statute into a ruling invalidating the law in all of its applications.[9]

  

**Reminder:**

In a facial challenge in the context of First Amendment protection of speech, the first step in overbreadth analysis is to construe the challenged statute;[10] it is impossible to determine whether a statute reaches too far without first knowing what the statute covers.[11] The court must the determine whether an overbroad statute can be interpreted to avoid overbreadth.[12] The courts must use every reasonable construction to save a statute from unconstitutionality by overbreadth.[13]

If a law is found deficient because of overbreadth as applied to others, it may not be applied to the particular litigant either, until and unless a satisfactorily limiting construction is placed on the legislation.[14] The overbreadth of a law in relation to the First Amendment protections suffices to invalidate all enforcement of that law, until and unless limiting construction or partial invalidation so narrows it as to remove a seeming threat or deterrence to constitutional protections.[15] Any enforcement of a statute challenged on the ground of overbreadth is totally forbidden, until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrents to the constitutionally protected expression; for this rule to apply, the legislation must be susceptible of a narrowing construction in the first place.[16]

**Observation:**

An important factor considered by the Supreme Court in determining the overbreadth of legislation is the Court's balancing of the governmental interests involved against First Amendment rights.[17]

Where First Amendment freedoms are at stake, precision of drafting and clarity of purpose of regulating legislation are essential.[18] While the government may regulate the exercise of constitutionally protected rights in order to promote a compelling interest, it must choose the least restrictive means to further the articulated interest.[19] The government may enforce reasonable time, place, and manner regulations as long as the restrictions are content neutral, are narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels of communication, and additional restrictions, such as an absolute prohibition on a particular type of expression, will be upheld only if narrowly drawn to accomplish a compelling governmental interest.[20]

  

**Caution:**

Declaring a statute facially unconstitutional because of overbreadth "is, manifestly, strong medicine," and such a declaration is employed by the courts sparingly and only as a last resort.[21] As to the overbreadth doctrine, a declaration of facial invalidity of legislation is inappropriate where (1) there are a substantial number of situations to which the legislation might be validly applied,[22] (2) the legislation covers a whole range of easily identifiable and constitutionally proscribable conduct,[23] or (3) the legislation is susceptible of a narrowing construction.[24]

In determining whether legislation which violates the First Amendment on the ground of overbreadth may be saved from invalidity by a narrowing construction, the federal courts lack jurisdiction to authoritatively construe state legislation so as to avoid constitutional issues but have the power to give a federal statute an authoritative construction.[25] Only the state courts can supply the requisite narrowing construction, since the federal courts lack jurisdiction to authoritatively construe state legislation.[26] The court must, however, adopt any limiting construction proffered by a state court,[27] and an overbreadth challenge to state legislation has been rejected on the ground that the state courts had given the legislation a narrowing construction.[28] In other cases, state legislation has been held invalid on the ground of overbreadth when the state court's construction of the legislation did not properly narrow its scope.[29]

While the federal courts' interpretation of a state statute is not binding on state authorities, a federal court still must determine what a state statute means before it can judge its facial constitutionality.[30] The doctrine of abstention—when issues of constitutional dimension implicate or depend on unsettled questions of state law—is inapplicable when a clear and precise state statute, not susceptible to a narrowing construction by the state courts, is challenged on the grounds of overbreadth.[31]

**Caution:**

The overbreadth doctrine does not apply to commercial speech.[32]

**CUMULATIVE SUPPLEMENT**

**Cases:**

  

There must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the court for it to be facially challenged on overbreadth grounds. U.S. Const. Amend. 1. State v. Grohn, 612 S.W.3d 78 (Tex. App. Beaumont 2020), petition for discretionary review filed, (Dec. 16, 2020).

**[END OF SUPPLEMENT]**



Footnotes

1 Washington State Grange v. Washington State Republican Party, 552 U.S. 442, 128 S. Ct. 1184, 170 L. Ed. 2d 151 (2008); Virginia v. Hicks, 539 U.S. 113, 123 S. Ct. 2191, 156 L. Ed. 2d 148 (2003); United States v. Hoffert, 949 F.3d 782 (3d Cir. 2020); Doe I v. Landry, 909 F.3d 99 (5th Cir. 2018); Schickel v. Dilger, 925 F.3d 858 (6th Cir. 2019), cert. denied, 140 S. Ct. 649, 205 L. Ed. 2d 388 (2019); Willson v. City of Bel-Nor, Missouri, 924 F.3d 995 (8th Cir. 2019); State v. Williams, 299 Kan. 911, 329 P.3d 400, 101 A.L.R.6th 663 (2014); State ex rel. City of Providence v. Auger, 44 A.3d 1218 (R.I. 2012).

2 Virginia v. Hicks, 539 U.S. 113, 123 S. Ct. 2191, 156 L. Ed. 2d 148 (2003); Ashcroft v. Free Speech Coalition, 535 U.S. 234, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002); United States v. Ackell, 907 F.3d 67 (1st Cir. 2018), cert. denied, 139 S. Ct. 2012, 204 L. Ed. 2d 220 (2019); United States v. Bonin, 932 F.3d 523 (7th Cir. 2019), cert. denied, 2020 WL 411718 (U.S. 2020); Doe v. Valencia College, 903 F.3d 1220, 358 Ed. Law Rep. 80 (11th Cir. 2018); State v. Smith, 144 So. 3d 867 (La. 2014); Com. v. Johnson, 470 Mass. 300, 21 N.E.3d 937 (2014).
The substantiality standard applied to a facial challenge to the overbreadth of a statute that implicates First Amendment rights is steep and reflects the concern that the overbreadth doctrine itself might sweep so broadly that the exception to ordinary standing requirements would swallow the general rule. State v. Culver, 2018 WI App 55, 384 Wis. 2d 222, 918 N.W.2d 103 (Ct. App. 2018), review denied, 2019 WI 8, 385 Wis. 2d 206, 923 N.W.2d 165 (2018).

3 Schickel v. Dilger, 925 F.3d 858 (6th Cir. 2019), cert. denied, 140 S. Ct. 649, 205 L. Ed. 2d 388 (2019).

4 United States v. Hoffert, 949 F.3d 782 (3d Cir. 2020); U.S. v. Tomsha-Miguel, 766 F.3d 1041 (9th Cir. 2014).
The statute need not be unconstitutional in all its applications. Wright v. City of St. Petersburg, Florida, 833 F.3d 1291 (11th Cir. 2016).

5 U.S. v. Williams, 553 U.S. 285, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (2008); Virginia v. Hicks, 539 U.S. 113, 123 S. Ct. 2191, 156 L. Ed. 2d 148 (2003); Ashcroft v. Free Speech Coalition, 535 U.S. 234, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002); Bushco v. Shurtleff, 729 F.3d 1294 (10th Cir. 2013).

6 U.S. v. Williams, 553 U.S. 285, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (2008); Virginia v. Hicks, 539 U.S. 113, 123 S. Ct. 2191, 156 L. Ed. 2d 148 (2003).

7 United States v. Ackell, 907 F.3d 67 (1st Cir. 2018), cert. denied, 139 S. Ct. 2012, 204 L. Ed. 2d 220 (2019); United States v. Bonin, 932 F.3d 523 (7th Cir. 2019), cert. denied, 2020 WL 411718 (U.S. 2020); Doe v. Valencia College, 903 F.3d 1220, 358 Ed. Law Rep. 80 (11th Cir. 2018).

8 U.S. v. Williams, 553 U.S. 285, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (2008); United States v. Hoffert, 949 F.3d 782 (3d Cir. 2020); Bushco v. Shurtleff, 729 F.3d 1294 (10th Cir. 2013).

9 Speet v. Schuette, 726 F.3d 867 (6th Cir. 2013).

10 U.S. v. Stevens, 559 U.S. 460, 130 S. Ct. 1577, 176 L. Ed. 2d 435 (2010); United States v. Hoffert, 949 F.3d 782 (3d Cir. 2020); Seals v. McBee, 898 F.3d 587 (5th Cir. 2018), as revised (Aug. 9, 2018); Willson v. City of Bel-Nor, Missouri, 924 F.3d 995 (8th Cir. 2019); People v. Marquan M., 24 N.Y.3d 1, 994 N.Y.S.2d 554, 19 N.E.3d 480, 310 Ed. Law Rep. 1079 (2014).

11 U.S. v. Stevens, 559 U.S. 460, 130 S. Ct. 1577, 176 L. Ed. 2d 435 (2010); United States of America v. Sineneng-Smith, 910 F.3d 461 (9th Cir. 2018), for additional opinion, see, 744 Fed. Appx. 498 (9th Cir. 2018) and cert. granted, 140 S. Ct. 36, 204 L. Ed. 2d 1194 (2019).

12 State v. Babson, 355 Or. 383, 326 P.3d 559 (2014).

13 List v. Ohio Elections Com'n, 45 F. Supp. 3d 765 (S.D. Ohio 2014), aff'd, 814 F.3d 466 (6th Cir. 2016).

14 Plummer v. City of Columbus, Ohio, 414 U.S. 2, 94 S. Ct. 17, 38 L. Ed. 2d 3 (1973); Gooding v. Wilson, 405 U.S. 518, 92 S. Ct. 1103, 31 L. Ed. 2d 408 (1972).

15 Virginia v. Hicks, 539 U.S. 113, 123 S. Ct. 2191, 156 L. Ed. 2d 148 (2003).

16 Broadrick v. Oklahoma, 413 U.S. 601, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973).

17 Erznoznik v. City of Jacksonville, 422 U.S. 205, 95 S. Ct. 2268, 45 L. Ed. 2d 125 (1975); Grayned v. City of Rockford, 408 U.S. 104, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972).

18 Erznoznik v. City of Jacksonville, 422 U.S. 205, 95 S. Ct. 2268, 45 L. Ed. 2d 125 (1975).

19 Sable Communications of California, Inc. v. F.C.C., 492 U.S. 115, 109 S. Ct. 2829, 106 L. Ed. 2d 93 (1989); Boos v. Barry, 485 U.S. 312, 108 S. Ct. 1157, 99 L. Ed. 2d 333 (1988); Widmar v. Vincent, 454 U.S. 263, 102 S. Ct. 269, 70 L. Ed. 2d 440, 1 Ed. Law Rep. 13 (1981).

20 U.S. v. Grace, 461 U.S. 171, 103 S. Ct. 1702, 75 L. Ed. 2d 736 (1983); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 103 S. Ct. 948, 74 L. Ed. 2d 794, 9 Ed. Law Rep. 23 (1983); Schad v. Borough of Mount Ephraim, 452 U.S. 61, 101 S. Ct. 2176, 68 L. Ed. 2d 671 (1981).

21 U.S. v. Williams, 553 U.S. 285, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (2008); Los Angeles Police Dept. v. United Reporting Pub. Corp., 528 U.S. 32, 120 S. Ct. 483, 145 L. Ed. 2d 451 (1999); United States v. Henry, 827 F.3d 16 (1st Cir. 2016); Golb v. Attorney General of the State of New York, 870 F.3d 89 (2d Cir. 2017), cert. denied, 138 S. Ct. 988, 200 L. Ed. 2d 251 (2018); In re Judicial Campaign Complaint Against Stormer, 137 Ohio St. 3d 449, 2013-Ohio-4584, 1 N.E.3d 317 (2013).

22 Parker v. Levy, 417 U.S. 733, 94 S. Ct. 2547, 41 L. Ed. 2d 439 (1974).

23 Parker v. Levy, 417 U.S. 733, 94 S. Ct. 2547, 41 L. Ed. 2d 439 (1974); Broadrick v. Oklahoma, 413 U.S. 601, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973); State v. Doe, 148 Idaho 919, 231 P.3d 1016 (2010).

24 Broadrick v. Oklahoma, 413 U.S. 601, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973).

25 U.S. v. 12 200-Foot Reels of Super 8mm. Film, 413 U.S. 123, 93 S. Ct. 2665, 37 L. Ed. 2d 500 (1973); U. S. v. Thirty-Seven (37) Photographs, 402 U.S. 363, 91 S. Ct. 1416, 28 L. Ed. 2d 822 (1971).

26 Lewis v. City of New Orleans, 415 U.S. 130, 94 S. Ct. 970, 39 L. Ed. 2d 214 (1974); Gooding v. Wilson, 405 U.S. 518, 92 S. Ct. 1103, 31 L. Ed. 2d 408 (1972).

Where state statute challenged for overbreadth under First Amendment has been construed by state's highest court, the scope of statute is to be assessed in light of the construction that court has given. Turney v. Pugh, 400 F.3d 1197 (9th Cir. 2005).

27 Bell v. Keating, 697 F.3d 445 (7th Cir. 2012).

28 Broadrick v. Oklahoma, 413 U.S. 601, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973); Law Students Civil Rights Research Council, Inc. v. Wadmond, 401 U.S. 154, 91 S. Ct. 720, 27 L. Ed. 2d 749 (1971).

29 Erznoznik v. City of Jacksonville, 422 U.S. 205, 95 S. Ct. 2268, 45 L. Ed. 2d 125 (1975); Lewis v. City of New Orleans, 415 U.S. 130, 94 S. Ct. 970, 39 L. Ed. 2d 214 (1974); Plummer v. City of Columbus, Ohio, 414 U.S. 2, 94 S. Ct. 17, 38 L. Ed. 2d 3 (1973).

30 Broadrick v. Oklahoma, 413 U.S. 601, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973).

31 Zwickler v. Koota, 389 U.S. 241, 88 S. Ct. 391, 19 L. Ed. 2d 444 (1967).

32 Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982).

**End of Document**

**16A Am. Jur. 2d Constitutional Law § 423**

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**IX. Fundamental Constitutional Rights and Privileges**

**C. Particular Fundamental Constitutional Rights**

**1. First Amendment Rights Guaranteed by Constitution**

**a. In General**

# § 423. Overbreadth challenges under First Amendment constitutional rights—Particular provisions

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 1170 to 1205

Decisions on the merits of a challenge of overbreadth of legislation affecting First Amendment rights cover a wide range of subject matter, such as legislation directed to: abusive, profane, or otherwise opprobrious language;[1] breach of the peace;[2] cable television;[3] courtroom news coverage;[4] denying access to military posts;[5] disorderly or annoying conduct;[6] disrupting a public employee's performance of official duties;[7] disrupting official proceedings;[8] distribution of literature and handbills;[9] licensing and license taxes;[10] loyalty oaths and proof;[11] military laws;[12] noise abatement;[13] obscene matters;[14] photographing, videotaping, recording, broadcasting, or transmitting a visual image of another with intent to gratify or arouse sexual desire;[15] picketing, demonstrations, and protest marches;[16] prison control and management;[17] unauthorized use of police badge or other indicia of authority;[18] public employment, including political activities,[19] employment of subversives,[20] subversive activities;[21] the transfer of sexually explicit materials "harmful to minors";[22] public nudity;[23] reporting requirements under campaign finance law;[24] promotion of child pornography and possession of child pornography;[25] and virtual child pornography.[26]

First Amendment challenges based on overbreadth were rejected as to—

  

— the Federal Election Campaign Act of 1971 imposing a monetary limitation on contributions by individuals and groups to any single candidate with respect to any election for federal office[27]

— a campaign ethics statute prohibiting legislators from accepting gifts from lobbyists[28]

— a state forgery statute proscribing the false making, completing or altering a written instrument when done with intent to defraud, deceive, or injure another[29]

— a state statute requiring interior designers practicing in nonresidential, commercial settings within the state to obtain a state license[30]

— a state statute prohibiting the Internet dissemination of material harmful to juveniles by personally directed communications[31]

— a statute prohibiting attempts to persuade minors to engage in unlawful sexual activity or to engage in explicit conduct for the purpose of producing visual depictions[32]

— a statute criminalizing child solicitation by electronic communication[33]

— an ordinance requiring a police officer, on observing a person reasonably believed to be a criminal street gang member loitering in any public place with one or more other persons, to order all such persons to disperse, and made the failure to obey such an order promptly a violation of the ordinance[34]

— an ordinance prohibiting registered sex offenders from entering public libraries[35]

— an ordinance licensing scheme for sexually oriented businesses, as defined for particular materials depicting sexual activities[36]

— an ordinance prohibiting any person selling or offering to sell tickets near a stadium or playing field[37]

— an ordinance criminalizing "standing, sitting or otherwise loitering" in a designated high drug activity area for more than 30 minutes[38]

— school district guidelines prohibiting a school official from encouraging, leading, initiating, mandating, or otherwise coercing students into prayer[39]

— a statute prohibiting the carrying of an animal in a cruel or inhuman manner[40]

— a statute requiring the inclusion, in the ballot title, of a statement that the "measure may cause property taxes to increase more than three percent," for ballot initiatives proposing a local option tax[41]

— a statute prohibiting making of threats against the President of the United States[42]

— a school district's policy prohibiting possession of Confederate symbols[43]



Footnotes

1 Lewis v. City of New Orleans, 415 U.S. 130, 94 S. Ct. 970, 39 L. Ed. 2d 214 (1974); Plummer v. City of Columbus, Ohio, 414 U.S. 2, 94 S. Ct. 17, 38 L. Ed. 2d 3 (1973); Gooding v. Wilson, 405 U.S. 518, 92 S. Ct. 1103, 31 L. Ed. 2d 408 (1972).

2 Broadrick v. Oklahoma, 413 U.S. 601, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973); Brown v. State of La., 383 U.S. 131, 86 S. Ct. 719, 15 L. Ed. 2d 637 (1966).

3 Swarner v. U.S., 937 F.2d 1478 (9th Cir. 1991).

4 Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 96 S. Ct. 2791, 49 L. Ed. 2d 683 (1976); Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1975).

5 Swarner v. U.S., 937 F.2d 1478 (9th Cir. 1991).

6 Coates v. City of Cincinnati, 402 U.S. 611, 91 S. Ct. 1686, 29 L. Ed. 2d 214 (1971).

7 U.S. v. Brice, 926 F.2d 925 (9th Cir. 1991).

8 Melugin v. Hames, 38 F.3d 1478 (9th Cir. 1994).

9 Talley v. California, 362 U.S. 60, 80 S. Ct. 536, 4 L. Ed. 2d 559 (1960); Martin v. City of Struthers, Ohio, 319 U.S. 141, 63 S. Ct. 862, 87 L. Ed. 1313 (1943).

10 Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 72 S. Ct. 777, 96 L. Ed. 1098 (1952); Midvale City Corp. v. Haltom, 2003 UT 26, 73 P.3d 334 (Utah 2003).

11 Communist Party of Indiana v. Whitcomb, 414 U.S. 441, 94 S. Ct. 656, 38 L. Ed. 2d 635 (1974).

12 Secretary of Navy v. Avrech, 418 U.S. 676, 94 S. Ct. 3039, 41 L. Ed. 2d 1033 (1974).

13 Reeves v. McConn, 631 F.2d 377 (5th Cir. 1980).

14 U.S. v. Orito, 413 U.S. 139, 93 S. Ct. 2674, 37 L. Ed. 2d 513 (1973).

15 Ex parte Thompson, 442 S.W.3d 325 (Tex. Crim. App. 2014).

16 Madsen v. Women's Health Center, Inc., 512 U.S. 753, 114 S. Ct. 2516, 129 L. Ed. 2d 593 (1994); Phelps-Roper v. Strickland, 539 F.3d 356 (6th Cir. 2008) (parts of funeral picketing statute not overbroad).

17 U.S. v. Berrigan, 482 F.2d 171, 21 A.L.R. Fed. 105 (3d Cir. 1973) (rejected on other grounds by, U.S. v. Everett, 692 F.2d 596, 12 Fed. R. Evid. Serv. 112 (9th Cir. 1982)).

18 Sult v. State, 906 So. 2d 1013 (Fla. 2005).

19 Broadrick v. Oklahoma, 413 U.S. 601, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973); U. S. Civil Service Commission v. National Ass'n of Letter Carriers, AFL-CIO, 413 U.S. 548, 93 S. Ct. 2880, 37 L. Ed. 2d 796 (1973).

20 Keyishian v. Board of Regents of University of State of N. Y., 385 U.S. 589, 87 S. Ct. 675, 17 L. Ed. 2d 629 (1967); Shelton v. Tucker, 364 U.S. 479, 81 S. Ct. 247, 5 L. Ed. 2d 231 (1960).

21 Brandenburg v. Ohio, 395 U.S. 444, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969).

22 American Booksellers Foundation v. Dean, 342 F.3d 96 (2d Cir. 2003).

23 Dodger's Bar & Grill, Inc. v. Johnson County Bd. of County Com'rs, 32 F.3d 1436 (10th Cir. 1994).

24 Alaska Right To Life Committee v. Miles, 441 F.3d 773 (9th Cir. 2006) (held not overbroad).

25 U.S. v. Williams, 553 U.S. 285, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (2008).

26 Ashcroft v. Free Speech Coalition, 535 U.S. 234, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002) (overbroad).

27 Buckley v. Valeo, 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976).

28 Schickel v. Dilger, 925 F.3d 858 (6th Cir. 2019), cert. denied, 140 S. Ct. 649, 205 L. Ed. 2d 388 (2019).

29 Golb v. Attorney General of the State of New York, 870 F.3d 89 (2d Cir. 2017), cert. denied, 138 S. Ct. 988, 200 L. Ed. 2d 251 (2018).

30 Locke v. Shore, 634 F.3d 1185 (11th Cir. 2011).

31 American Booksellers Foundation for Free Expression v. Strickland, 601 F.3d 622 (6th Cir. 2010).

32 U.S. v. Hart, 635 F.3d 850 (6th Cir. 2011).

33 State v. Ebert, 150 N.M. 576, 2011-NMCA-098, 263 P.3d 918 (Ct. App. 2011).

34 City of Chicago v. Morales, 527 U.S. 41, 119 S. Ct. 1849, 144 L. Ed. 2d 67, 72 A.L.R.5th 665 (1999).

35 Doe v. City of Albuquerque, 667 F.3d 1111, 81 Fed. R. Serv. 3d 783 (10th Cir. 2012).

36 Deja Vu of Nashville, Inc. v. Metropolitan Government of Nashville & Davidson County, 466 F.3d 391, 2006 FED App. 0375A (6th Cir. 2006).

37 City of Chicago v. Haywood, 2018 IL App (1st) 180003, 428 Ill. Dec. 818, 123 N.E.3d 547 (App. Ct. 1st Dist. 2018).

  

38 Crews v. City of Chester, 35 A.3d 1267 (Pa. Commw. Ct. 2012).

39 Borden v. School Dist. of Tp. of East Brunswick, 523 F.3d 153, 231 Ed. Law Rep. 583 (3d Cir. 2008).

40 State v. Graves, 2017-Ohio-6942, 83 N.E.3d 963 (Ohio Ct. App. 12th Dist. Warren County 2017).

41 Caruso v. Yamhill County ex rel. County Com'r, 422 F.3d 848 (9th Cir. 2005).

42 U.S. v. Hanna, 293 F.3d 1080, 58 Fed. R. Evid. Serv. 1494 (9th Cir. 2002).

43 West v. Derby Unified School Dist. No. 260, 206 F.3d 1358, 143 Ed. Law Rep. 43 (10th Cir. 2000).

End of Document

# 16A Am. Jur. 2d Constitutional Law § 424

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**IX. Fundamental Constitutional Rights and Privileges**

**C. Particular Fundamental Constitutional Rights**

**1. First Amendment Rights Guaranteed by Constitution**

**b. Religious Freedom Guaranteed by Constitution**

**(1) In General**

## § 424. Source and purpose of religious freedom guarantee by Federal Constitution

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 1290

The First Amendment to the Constitution of the United States forbids Congress to make any law respecting an establishment of religion or prohibiting the free exercise thereof.[1] The First Amendment was adopted against the historical background of life under the established Church of England.[2] The purposes of the First Amendment guarantees relating to religion are twofold: to foreclose state interference with the practice of religious faith; and to foreclose the establishment of a state religion familiar in other 18th-century systems.[3] The Religion Clauses of the Constitution aim to foster a society in which people of all beliefs can live together harmoniously,[4] establishing a scrupulous policy against political interference with religious affairs.[5]

The Religion Clauses of the Constitution extend to both legislative and judicial action.[6] While technically and originally an inhibition to Congress only, the First Amendment is applicable to the states under the 14th Amendment,[7] applying equally to state and federal government.[8]

The constitutional inhibition of legislation on the subject of religion has a double aspect: the Establishment Clause forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship;[9] the Free Exercise Clause safeguards the free exercise of each person's chosen form of religion.[10] By pairing the Free Exercise Clause with the Establishment

  

Clause, the Framers sought to prevent government from choosing sides on matters of faith and to protect religious minorities from exclusion or punishment at the hands of the state.[11] The interrelation of the Establishment and Free Exercise Clauses has been well summarized as follows: the structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference, and has secured religious liberty from the invasion of the civil authority.[12] Although the two clauses overlap in certain instances[13] and there can be an internal tension between the two,[14] a general harmony of purpose exists between them,[15] and the two clauses work together to safeguard the spiritual freedom of the people.[16] Nonetheless, the limits of permissible state accommodation to religion under the Establishment Clause are not coextensive with the noninterference mandated by the Free Exercise Clause.[17] A distinction between the Free Exercise and the Establishment Clauses of the First Amendment is that a violation of the former clause is predicated on coercion, while a violation of the latter clause need not be so attended.[18] Just as religion-specific accommodations not required by the Free Exercise Clause are not necessarily forbidden under the Establishment Clause, the Free Exercise Clause does not mandate the inclusion of religious institutions within every government program where their inclusion would be permissible under the Establishment Clause.[19]

There is room for play in the joints between the Free Exercise and Establishment Clauses,[20] and there is some space for legislative action which is neither compelled by the Free Exercise Clause nor prohibited by the Establishment Clause.[21] Conversely, there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause.[22]



Footnotes

1 U.S. Const. Amend. I.

2 Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C., 565 U.S. 171, 132 S. Ct. 694, 181 L. Ed. 2d 650, 274 Ed. Law Rep. 774 (2012).

3 Larkin v. Grendel's Den, Inc., 459 U.S. 116, 103 S. Ct. 505, 74 L. Ed. 2d 297 (1982).

4 American Legion v. American Humanist Association, 139 S. Ct. 2067, 204 L. Ed. 2d 452 (2019).

5 Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C., 565 U.S. 171, 132 S. Ct. 694, 181 L. Ed. 2d 650, 274 Ed. Law Rep. 774 (2012); Duquesne University of the Holy Spirit v. National Labor Relations Board, 947 F.3d 824, 374 Ed. Law Rep. 46 (D.C. Cir. 2020).

6 Petruska v. Gannon University, 462 F.3d 294, 212 Ed. Law Rep. 598 (3d Cir. 2006); Aldrich on behalf of Bethel Lutheran Church v. Nelson on behalf of Bethel Lutheran Church, 290 Neb. 167, 859 N.W.2d 537 (2015).

7 § 417.

8 Comer v. Scott, 610 F.3d 929, 258 Ed. Law Rep. 521 (5th Cir. 2010).

9 § 428.

10 § 435.

11 Lund v. Rowan County, North Carolina, 863 F.3d 268 (4th Cir. 2017), cert. denied, 138 S. Ct. 2564, 201 L. Ed. 2d 1101 (2018).

12 Everson v. Board of Ed. of Ewing Tp., 330 U.S. 1, 67 S. Ct. 504, 91 L. Ed. 711, 168 A.L.R. 1392 (1947).

13 School Dist. of Abington Tp., Pa. v. Schempp, 374 U.S. 203, 83 S. Ct. 1560, 10 L. Ed. 2d 844 (1963).

14 Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C., 565 U.S. 171, 132 S. Ct. 694, 181 L. Ed. 2d 650, 274 Ed. Law Rep. 774 (2012).

15 Gillette v. U.S., 401 U.S. 437, 91 S. Ct. 828, 28 L. Ed. 2d 168 (1971).

16 Ray v. Commissioner, Alabama Department of Corrections, 915 F.3d 689 (11th Cir. 2019).

17 Walz v. Tax Commission of City of New York, 397 U.S. 664, 90 S. Ct. 1409, 25 L. Ed. 2d 697 (1970).

18 Committee For Public Ed. and Religious Liberty v. Nyquist, 413 U.S. 756, 93 S. Ct. 2955, 37 L. Ed. 2d 948 (1973); School Dist. of Abington Tp., Pa. v. Schempp, 374 U.S. 203, 83 S. Ct. 1560, 10 L. Ed. 2d 844 (1963).

19 Colorado Christian University v. Weaver, 534 F.3d 1245, 235 Ed. Law Rep. 68 (10th Cir. 2008).

20 Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 198 L. Ed. 2d 551 (2017); Cutter v. Wilkinson, 544 U.S. 709, 125 S. Ct. 2113, 161 L. Ed. 2d 1020 (2005).

21 Cutter v. Wilkinson, 544 U.S. 709, 125 S. Ct. 2113, 161 L. Ed. 2d 1020 (2005).

22 Locke v. Davey, 540 U.S. 712, 124 S. Ct. 1307, 158 L. Ed. 2d 1, 185 Ed. Law Rep. 30 (2004).

**End of Document**

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**IX. Fundamental Constitutional Rights and Privileges**

**C. Particular Fundamental Constitutional Rights**

**1. First Amendment Rights Guaranteed by Constitution**

**b. Religious Freedom Guaranteed by Constitution**

**(1) In General**

# § 425. Nature of right of religious freedom guaranteed by Federal Constitution

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 1290 to 1292

The First Amendment commits government itself to religious tolerance, and on even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures.[1] At a minimum, the First Amendment guarantees that the government may not coerce anyone to support or participate in religion or its exercise or otherwise act in a way which establishes a state religion or a religious faith or which tends to do so.[2] It prohibits government from compelling affirmation of religious belief, punishing expression of religious doctrines it believes to be false, imposing special disabilities on basis of religious views or religious status, or lending its power to one or other side in controversies over religious authority or dogma.[3] In short, the First Amendment's guarantee of freedom of religion includes freedom from religious discrimination; absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits.[4]

The individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all.[5] The First Amendment protects an individual's freedom to worship, or not to worship, as the individual chooses.[6]

The First Amendment affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.[7] The liberties of religion are infringed by the denial of or placing of conditions on a benefit or privilege.[8] A state cannot

  

exclude individuals or the members of any particular faith from receiving the benefits of public welfare legislation because of their faith or lack of it.[9] However, an accommodation cannot treat religions favorably when secular groups are identical with respect to the attribute selected for that accommodation; neutrality is essential to the validity of a religious accommodation under the First Amendment.[10]

The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths,[11] protecting a private sphere within which religious bodies are free to govern themselves in accordance with their own beliefs.[12]

A personal religious faith is entitled to as much protection as one espoused by an organized group under the First Amendment.[13] Heretics have religious rights protected by the First Amendment, and a sincere religious believer does not forfeit religious rights under the First Amendment merely by being not scrupulous in observance.[14] Sincere religious belief cannot be subjected to a judicial sorting of the heretical from the mainstream.[15]

Religious beliefs protected by the Establishment Clause need not involve worship of a supreme being.[16] Nontheistic organizations may be "religions" for First Amendment purposes.[17] Atheists who do not call their own stance a religion are nonetheless entitled to the benefit of the First Amendment's neutrality principle, under which states cannot favor or disfavor religion vis—vis comparable secular belief systems.[18]

First Amendment protection does not extend to purely secular beliefs or personal preferences.[19]



Footnotes

1 Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Com'n, 138 S. Ct. 1719, 201 L. Ed. 2d 35 (2018).

2 Lee v. Weisman, 505 U.S. 577, 112 S. Ct. 2649, 120 L. Ed. 2d 467, 75 Ed. Law Rep. 43 (1992).

3 Central Rabbinical Congress of U.S. & Canada v. New York City Dept. of Health & Mental Hygiene, 763 F.3d 183 (2d Cir. 2014); In re Kemp, 894 F.3d 900 (8th Cir. 2018), cert. denied, 139 S. Ct. 1176, 203 L. Ed. 2d 199 (2019).

4 Hassan v. City of New York, 804 F.3d 277 (3d Cir. 2015), as amended (Feb. 2, 2016).

5 American Civil Liberties Union of New Jersey v. Black Horse Pike Regional Bd. of Educ., 84 F.3d 1471, 109 Ed. Law Rep. 1118 (3d Cir. 1996).

6 Maffei v. Roman Catholic Archbishop of Boston, 449 Mass. 235, 867 N.E.2d 300 (2007).

7 Lund v. Rowan County, North Carolina, 863 F.3d 268 (4th Cir. 2017), cert. denied, 138 S. Ct. 2564, 201 L. Ed. 2d 1101 (2018).

8 Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 198 L. Ed. 2d 551 (2017).

9 Sherbert v. Verner, 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963).
It is the state's obligation to extend government benefits to all citizens without regard to their religious beliefs. Hofer v. Montana Dept. of Public Health and Human Services, 2005 MT 302, 329 Mont. 368, 124 P.3d 1098 (2005).

10 Center for Inquiry, Inc. v. Marion Circuit Court Clerk, 758 F.3d 869 (7th Cir. 2014).

11 Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Com'n, 138 S. Ct. 1719, 201 L. Ed. 2d 35 (2018).

12 Whole Woman's Health v. Smith, 896 F.3d 362, 101 Fed. R. Serv. 3d 532 (5th Cir. 2018), as revised, (July 17, 2018) and cert. denied, 139 S. Ct. 1170, 203 L. Ed. 2d 198 (2019).

13 Vinning-El v. Evans, 657 F.3d 591 (7th Cir. 2011).

14 Grayson v. Schuler, 666 F.3d 450 (7th Cir. 2012).

15 A.A. ex rel. Betenbaugh v. Needville Indep. School Dist., 611 F.3d 248, 258 Ed. Law Rep. 955 (5th Cir. 2010).

16 Kaufman v. Pugh, 733 F.3d 692 (7th Cir. 2013).

17 Fields v. Speaker of Pennsylvania House of Representatives, 936 F.3d 142 (3d Cir. 2019).

18 Center for Inquiry, Inc. v. Marion Circuit Court Clerk, 758 F.3d 869 (7th Cir. 2014).

19 Love v. Reed, 216 F.3d 682 (8th Cir. 2000).

End of Document

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# § 426. Standing for challenge under freedom guaranteed by Federal Constitution

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 825 to 850

To establish Article III standing in a case arising from an alleged violation of the First Amendment Establishment Clause, a plaintiff must show, as in other cases, that the plaintiff is directly affected by the laws and practices against which the complaints are directed.[1] For Article III standing purposes, a plaintiff may establish nonreligious, economic,[2] and noneconomic injury in the context of alleged Establishment Clause violations, if directly affected by the laws and practices against which their complaints are directed.[3] Injury for Establishment Clause standing may be established by showing that the plaintiff has incurred a cost[4] or has been denied a benefit on account of the plaintiff's religion,[5] or by injury of direct and unwelcome personal contact with the alleged establishment of religion,[6] as may include a state's express condemnation or endorsement of religion,[7] or a government-sponsored religious expression or a governmental policy, statute, or regulation grounded in a religious tenet or principle.[8] Mere personal offense by the government's alleged violation of the Establishment Clause is not sufficient for standing.[9]

The Establishment Clause of the First Amendment constitutes a specific limitation on the congressional spending power, under which a federal taxpayer has standing to invoke federal judicial power to challenge federal taxing or spending statutes, provided the taxpayer is able to show a nexus between status as a taxpayer and the precise nature of the constitutional infringement alleged.[10] For Article III taxpayer standing to bring an Establishment Clause challenge, an essential component of the harm

  

alleged must be a direct religious subsidy,[11] a specific appropriation,[12] or a specific mandate,[13] and not tax credits[14] or other "tax expenditures,"[15] or a government program or activity funded from general appropriations.[16]

Standing to assert a violation of the First Amendment's Free Exercise Clause is narrower than standing to assert a violation of the Establishment Clause.[17] Standing under the Free Exercise Clause requires a showing of injury-in-fact to the plaintiff's free exercise rights,[18] or a specific and sufficiently concrete injury in violation of free exercise rights.[19] The requirements include proof of infringement of particular religious freedoms[20] personal to the plaintiff.[21] Objections to government action on nonreligious grounds do not establish standing under the Free Exercise Clause.[22] The Free Exercise Clause does not operate as a specific limitation on the taxing and spending power of Congress, and taxpayers do not have standing to bring claims under it unless they can show direct injury, as when government uses public funds to prevent directly the taxpayer's exercising of religious beliefs, but a taxpayer not affected by an allegedly unconstitutional expenditure does not have standing to challenge the expenditure.[23]



Footnotes

1 Trump v. Hawaii, 138 S. Ct. 2392, 201 L. Ed. 2d 775 (2018).
As to standing to challenge, on grounds of overbreadth, legislation affecting First Amendment rights in general, see § 422.
The Establishment Clause is no exception to the requirement of standing; it is not enough simply to argue that there has been some violation of the Establishment Clause without alleging a personal violation of rights. Barber v. Bryant, 860 F.3d 345 (5th Cir. 2017), cert. denied, 138 S. Ct. 652, 199 L. Ed. 2d 531 (2018) and cert. denied, 138 S. Ct. 671, 199 L. Ed. 2d 535 (2018).

2 Montesa v. Schwartz, 836 F.3d 176, 336 Ed. Law Rep. 60 (2d Cir. 2016).

3 Felix v. City of Bloomfield, 841 F.3d 848 (10th Cir. 2016).

4 Freedom from Religion Foundation, Inc. v. Lew, 773 F.3d 815 (7th Cir. 2014).

5 Montesa v. Schwartz, 836 F.3d 176, 336 Ed. Law Rep. 60 (2d Cir. 2016); Freedom from Religion Foundation, Inc. v. Lew, 773 F.3d 815 (7th Cir. 2014).

6 Freedom From Religion Foundation, Inc. v. County of Lehigh, 933 F.3d 275 (3d Cir. 2019); Patel v. U.S. Bureau of Prisons, 515 F.3d 807 (8th Cir. 2008); Felix v. City of Bloomfield, 841 F.3d 848 (10th Cir. 2016).
An immediate and personal confrontation with the object of government action suffices for a direct effect. Montesa v. Schwartz, 836 F.3d 176, 336 Ed. Law Rep. 60 (2d Cir. 2016).
An individual objecting to a religious display on government property or religious activity that is government-sponsored need not change behavior to avoid contact with the display to establish constitutional standing to challenge the display or behavior under the First Amendment's Establishment Clause; rather, standing exists either when plaintiffs are subjected to unwelcome religious exercises or are forced to assume special burdens to avoid them. Freedom from Religion Foundation Inc. v. New Kensington Arnold School District, 832 F.3d 469, 335 Ed. Law Rep. 45 (3d Cir. 2016).

7 American Humanist Association, Inc. v. Douglas County School District RE-1, 859 F.3d 1243, 344 Ed. Law Rep. 69 (10th Cir. 2017).

8 Montesa v. Schwartz, 836 F.3d 176, 336 Ed. Law Rep. 60 (2d Cir. 2016).

9 Freedom from Religion Foundation, Inc. v. Lew, 773 F.3d 815 (7th Cir. 2014).

10 Flast v. Cohen, 392 U.S. 83, 88 S. Ct. 1942, 20 L. Ed. 2d 947 (1968).
A logical link or nexus is required for taxpayer standing under the Establishment Clause. Manzara v. State, 343 S.W.3d 656 (Mo. 2011).
Taxpayers have standing for the limited purpose of challenging a direct spending program that implicates the restrictions of the Establishment Clause. Barber v. Bryant, 860 F.3d 345 (5th Cir. 2017), cert. denied, 138 S. Ct. 652, 199 L. Ed. 2d 531 (2018) and cert. denied, 138 S. Ct. 671, 199 L. Ed. 2d 535 (2018).

The mere fact that the tax code conditions the availability of a tax exemption on religious affiliation does not give a plaintiff standing to challenge that provision of the code under the Establishment Clause; a plaintiff cannot establish standing to challenge such a provision without having personally claimed and been denied the exemption. Freedom from Religion Foundation, Inc. v. Lew, 773 F.3d 815 (7th Cir. 2014).

11 Ansley v. Warren, 861 F.3d 512 (4th Cir. 2017).

12 Murray v. U.S. Dept. of Treasury, 681 F.3d 744 (6th Cir. 2012); Freedom from Religion Foundation, Inc. v. Lew, 773 F.3d 815 (7th Cir. 2014).

13 Murray v. U.S. Dept. of Treasury, 681 F.3d 744 (6th Cir. 2012).

14 Arizona Christian School Tuition Organization v. Winn, 563 U.S. 125, 131 S. Ct. 1436, 179 L. Ed. 2d 523, 265 Ed. Law Rep. 855 (2011); Freedom from Religion Foundation, Inc. v. Lew, 773 F.3d 815 (7th Cir. 2014).

15 Freedom from Religion Foundation, Inc. v. Lew, 773 F.3d 815 (7th Cir. 2014).

16 Laskowski v. Spellings, 546 F.3d 822, 238 Ed. Law Rep. 530 (7th Cir. 2008).

An Establishment Clause challenge by an organization opposed to government endorsement of religion, and three of its members, to a federal agency's use of federal money to fund conferences to promote the President's "faith-based initiatives" did not fall within the purview of the narrow exception to the general constitutional prohibition against taxpayer standing for challenges to disbursements of public funds made in exercise of congressional taxing and spending power where expenditures were funded by specific congressional appropriation and undertaken pursuant to express congressional mandate. Hein v. Freedom From Religion Foundation, Inc., 551 U.S. 587, 127 S. Ct. 2553, 168 L. Ed. 2d 424, 44 A.L.R. Fed. 2d 637 (2007).

17 Montesa v. Schwartz, 836 F.3d 176, 336 Ed. Law Rep. 60 (2d Cir. 2016).

18 Hassan v. City of New York, 804 F.3d 277 (3d Cir. 2015), as amended (Feb. 2, 2016); Temple B'Nai Zion, Inc. v. City of Sunny Isles Beach, Fla., 727 F.3d 1349 (11th Cir. 2013); State v. McKinley, 2016-Ohio-3420, 66 N.E.3d 200 (Ohio Ct. App. 7th Dist. Mahoning County 2016).

A merely conjectural injury is not sufficient for free exercise standing, as in a challenge to zoning ordinances when the plaintiff never submitted a formal proposal for a building permit or applied for a building permit. Congregation Rabbinical College of Tartikov, Inc. v. Village of Pomona, NY, 945 F.3d 83, 372 Ed. Law Rep. 567 (2d Cir. 2019).

19 Doe v. Virginia Dept. of State Police, 713 F.3d 745 (4th Cir. 2013).

Indigent pregnant females who sued on behalf of other women similarly situated lacked standing to challenge on free exercise grounds the Hyde Amendment, which severely limits use of federal funds to reimburse the costs of abortions under Medicaid program, where none of the named plaintiffs alleged, much less proved, that she sought an abortion under compulsion of religious belief. Harris v. McRae, 448 U.S. 297, 100 S. Ct. 2671, 65 L. Ed. 2d 784 (1980).

20 School Dist. of Abington Tp., Pa. v. Schempp, 374 U.S. 203, 83 S. Ct. 1560, 10 L. Ed. 2d 844 (1963); Altman v. Bedford Cent. School Dist., 245 F.3d 49, 152 Ed. Law Rep. 86 (2d Cir. 2001); Littlefield v. Forney Independent School Dist., 268 F.3d 275, 158 Ed. Law Rep. 36 (5th Cir. 2001).

21 Altman v. Bedford Cent. School Dist., 245 F.3d 49, 152 Ed. Law Rep. 86 (2d Cir. 2001); Littlefield v. Forney Independent School Dist., 268 F.3d 275, 158 Ed. Law Rep. 36 (5th Cir. 2001).

22 Phillips v. City of New York, 775 F.3d 538, 313 Ed. Law Rep. 452 (2d Cir. 2015).

23 Tarsney v. O'Keefe, 225 F.3d 929 (8th Cir. 2000).

End of Document

# 16A Am. Jur. 2d Constitutional Law § 427

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**IX. Fundamental Constitutional Rights and Privileges**

**C. Particular Fundamental Constitutional Rights**

**1. First Amendment Rights Guaranteed by Constitution**

**b. Religious Freedom Guaranteed by Constitution**

**(1) In General**

## § 427. State constitutional guarantee of religious freedom

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 1290

Most, if not all, state constitutions contain general guarantees of religious freedom,[1] ensuring persons of the right to worship according to the dictates of their own conscience,[2] or prohibiting discrimination on religious grounds by state action,[3] as may be at least as protective of religious liberty as the religion clauses of the First Amendment of the United States Constitution.[4] However, some state constitutions provide broader protections for religious liberty than the First Amendment.[5]

A compelling state interest test is applicable to religious freedom challenges under a state constitution,[6] including the narrowly tailored[7] or least restrictive means criterion,[8] provided the alleged infringement is more than merely incidental and is otherwise lawful,[9] or is real and not remote.[10] Less restrictive government action may be subject to review under a rational basis test.[11]

A state court is not limited to current Federal First Amendment jurisprudence when interpreting state constitutional protections for religious liberty; rather, the court is required to give effect to the more explicit guarantees set forth in the state constitution.[12]

Footnotes

1 Brown v. Smith, 24 Cal. App. 5th 1135, 235 Cal. Rptr. 3d 218, 356 Ed. Law Rep. 353 (2d Dist. 2018); Ricks v. State Contractors Board, 164 Idaho 689, 435 P.3d 1 (Ct. App. 2018), review denied, (Mar. 12, 2019); Matthies v. First Presbyterian Church of Greensburg Indiana, Inc., 28 N.E.3d 1109 (Ind. Ct. App. 2015); Heartland Presbytery v. Presbyterian Church of Stanley, Inc., 53 Kan. App. 2d 622, 390 P.3d 581 (2017); Gingerich v. Com., 382 S.W.3d 835 (Ky. 2012); Shaarei Tfiloh Congregation v. Mayor and City Council of Baltimore, 237 Md. App. 102, 183 A.3d 845 (2018); Magazu v. Department of Children and Families, 473 Mass. 430, 42 N.E.3d 1107 (2016); Winkler by Winkler v. Marist Fathers of Detroit, Inc., 500 Mich. 327, 901 N.W.2d 566, 348 Ed. Law Rep. 410 (2017); Christ Church Pentecostal v. Tennessee State Bd. of Equalization, 428 S.W.3d 800 (Tenn. Ct. App. 2013); Pure Presbyterian Church of Washington v. Grace of God Presbyterian Church, 296 Va. 42, 817 S.E.2d 547 (2018), cert. dismissed, 139 S. Ct. 942, 203 L. Ed. 2d 128 (2019); DeBruin v. St. Patrick Congregation, 2012 WI 94, 343 Wis. 2d 83, 816 N.W.2d 878 (2012); In re Neely, 2017 WY 25, 390 P.3d 728 (Wyo. 2017), cert. denied, 138 S. Ct. 639, 199 L. Ed. 2d 527 (2018).

2 Mandel v. Hodges, 54 Cal. App. 3d 596, 127 Cal. Rptr. 244, 90 A.L.R.3d 728 (1st Dist. 1976); Newstrand v. Arend, 869 N.W.2d 681 (Minn. Ct. App. 2015).

The New Mexico Constitution provides that no person shall be required to attend any place of worship or support any religious sect or denomination, speaking to compulsory participation in religious worship or observance. Elane Photography, LLC v. Willock, 2012-NMCA-086, 284 P.3d 428 (N.M. Ct. App. 2012), judgment aff'd, 2013-NMSC-040, 309 P.3d 53 (N.M. 2013).

3 Cenzon-DeCarlo v. Mount Sinai Hosp., 39 Misc. 3d 703, 962 N.Y.S.2d 845 (Sup 2010), order aff'd, 101 A.D.3d 924, 957 N.Y.S.2d 256 (2d Dep't 2012).

4 Winkler by Winkler v. Marist Fathers of Detroit, Inc., 500 Mich. 327, 901 N.W.2d 566, 348 Ed. Law Rep. 410 (2017); DeBruin v. St. Patrick Congregation, 2012 WI 94, 343 Wis. 2d 83, 816 N.W.2d 878 (2012).

5 Stinemetz v. Kansas Health Policy Authority, 45 Kan. App. 2d 818, 252 P.3d 141 (2011); Olson v. First Church of Nazarene, 661 N.W.2d 254 (Minn. Ct. App. 2003); Coulee Catholic Schools v. Labor and Industry Review Com'n, Dept. of Workforce Development, 2009 WI 88, 320 Wis. 2d 275, 768 N.W.2d 868 (2009); In re Neely, 2017 WY 25, 390 P.3d 728 (Wyo. 2017), cert. denied, 138 S. Ct. 639, 199 L. Ed. 2d 527 (2018).

6 Brown v. Smith, 24 Cal. App. 5th 1135, 235 Cal. Rptr. 3d 218, 356 Ed. Law Rep. 353 (2d Dist. 2018); Gingerich v. Com., 382 S.W.3d 835 (Ky. 2012); Magazu v. Department of Children and Families, 473 Mass. 430, 42 N.E.3d 1107 (2016); Newstrand v. Arend, 869 N.W.2d 681 (Minn. Ct. App. 2015).

7 Gingerich v. Com., 382 S.W.3d 835 (Ky. 2012).

8 Newstrand v. Arend, 869 N.W.2d 681 (Minn. Ct. App. 2015).

9 Magazu v. Department of Children and Families, 473 Mass. 430, 42 N.E.3d 1107 (2016).

10 Newstrand v. Arend, 869 N.W.2d 681 (Minn. Ct. App. 2015).

11 Gingerich v. Com., 382 S.W.3d 835 (Ky. 2012).

12 Coulee Catholic Schools v. Labor and Industry Review Com'n, Dept. of Workforce Development, 2009 WI 88, 320 Wis. 2d 275, 768 N.W.2d 868 (2009).

End of Document

# 16A Am. Jur. 2d Constitutional Law § 428

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**IX. Fundamental Constitutional Rights and Privileges**

**C. Particular Fundamental Constitutional Rights**

**1. First Amendment Rights Guaranteed by Constitution**

**b. Religious Freedom Guaranteed by Constitution**

**(2) "Establishment of Religion" Prohibited by Constitution**

## § 428. Nature and purpose of Establishment Clause of Constitution

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 1295 to 1301

**A.L.R. Library**

Construction and Application of Establishment Clause of First Amendment—United States Supreme Court Cases, 15 A.L.R. Fed. 2d 573

**Forms**

Forms relating to religious society, generally, see Am. Jur. Pleading and Practice Forms, Constitutional Law [Westlaw®(r) Search Query]

  

The Establishment Clause[1] of the First Amendment to the United States Constitution provides, inter alia, that "Congress shall make no law respecting an establishment of religion."[2] Although applicable originally only against the federal government, the Establishment Clause applies to the states by the 14th Amendment.[3]

The Framers' purpose under the Establishment Clause was to foreclose the establishment of a state religion familiar in other Eighteenth Century systems,[4] particularly as against the historical background of life under the established Church of England.[5] The government's manifesting a purpose to favor one faith over another or adherence to religion, generally, clashes with the understanding, reached after decades of religious war, that liberty and social stability demand a religious tolerance that respects the religious views of all citizens. By showing a purpose to favor religion, the government sends the message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members.[6] The prohibition rests on the belief that a union of government and religion tends to destroy government and to degrade religion and on an awareness of the historical fact that governmentally established religions and religious persecutions go hand in hand.[7] Under the Establishment Clause, the preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere.[8] The Establishment Clause protects the individual's freedom to believe, to worship, and to self-express in accordance with the dictates of the individual's own conscience, ensuring that the government in no way acts to make belief, whether theistic or nontheistic, religious or nonreligious, relevant to an individual's membership or standing in the political community.[9]

Under the Establishment Clause, the government cannot set up a church, pass laws which aid one religion, pass laws which aid all religions,[10] officially prefer one religious denomination over another,[11] or prefer religion to irreligion,[12] but the Establishment Clause does not bar any and all governmental preference for religion over irreligion.[13] The Establishment Clause does not require that a state extirpate all references to religion or religious symbols from the public life of the nation,[14] does not oblige government to avoid any public acknowledgment of religion's role in society,[15] and does not prevent the government from promoting and celebrating the nation's tradition of religious freedom;[16] rather, it leaves room to accommodate divergent values within a constitutionally permissible framework.[17]

The state may not establish a "religion of secularism" in a sense of affirmatively opposing or showing hostility to religion, thus preferring those who believe in no religion over those who do believe.[18] Government may not mandate a civic religion that stifles any but the most generic reference to the sacred under the Establishment Clause, any more than it may prescribe a religious orthodoxy.[19] The Establishment Clause does not oblige government to avoid any public acknowledgment of religion's role in society; rather, it leaves room to accommodate divergent values within a constitutionally permissible framework.[20]

The Establishment Clause must be interpreted by reference to historical practices and understandings,[21] and when history has not spoken, the courts must be informed by other relevant practices.[22] An Establishment Clause claim fails where history shows that the specific practice is permitted,[23] particularly a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change.[24]

**Observation:**

Generally, Establishment Clause cases fall into six categories involving (1) religious references or imagery in public monuments, symbols, mottos, displays, and ceremonies; (2) religious accommodations and exemptions from generally applicable laws; (3)

  

subsidies and tax exemptions; (4) religious expression in public schools; (5) regulation of private religious speech; and (6) state interference with internal church affairs.[25]



Footnotes

1 Town of Greece, N.Y. v. Galloway, 572 U.S. 565, 134 S. Ct. 1811, 188 L. Ed. 2d 835 (2014).

2 U.S. Const. Amend. I.

3 Freedom From Religion Foundation v. Hanover School Dist., 626 F.3d 1, 262 Ed. Law Rep. 106 (1st Cir. 2010).

4 Larkin v. Grendel's Den, Inc., 459 U.S. 116, 103 S. Ct. 505, 74 L. Ed. 2d 297 (1982).

5 Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C., 565 U.S. 171, 132 S. Ct. 694, 181 L. Ed. 2d 650, 274 Ed. Law Rep. 774 (2012).

6 McCreary County, Ky. v. American Civil Liberties Union of Ky., 545 U.S. 844, 125 S. Ct. 2722, 162 L. Ed. 2d 729, 15 A.L.R. Fed. 2d 865 (2005).

7 Engel v. Vitale, 370 U.S. 421, 82 S. Ct. 1261, 8 L. Ed. 2d 601, 86 A.L.R.2d 1285 (1962).

8 Santa Fe Independent School Dist. v. Doe, 530 U.S. 290, 120 S. Ct. 2266, 147 L. Ed. 2d 295, 145 Ed. Law Rep. 21 (2000).

9 Freedom From Religion Foundation, Inc. v. Chino Valley Unified School District Board of Education, 896 F.3d 1132, 356 Ed. Law Rep. 915 (9th Cir. 2018).

10 Larson v. Valente, 456 U.S. 228, 102 S. Ct. 1673, 72 L. Ed. 2d 33 (1982); Harris v. McRae, 448 U.S. 297, 100 S. Ct. 2671, 65 L. Ed. 2d 784 (1980).

11 Trump v. Hawaii, 138 S. Ct. 2392, 201 L. Ed. 2d 775 (2018); Williamson v. Brevard County, 928 F.3d 1296 (11th Cir. 2019).
As to the requirement of governmental neutrality, see § 432.

12 Board of Educ. of Kiryas Joel Village School Dist. v. Grumet, 512 U.S. 687, 114 S. Ct. 2481, 129 L. Ed. 2d 546, 91 Ed. Law Rep. 810 (1994).

13 Van Orden v. Perry, 545 U.S. 677, 125 S. Ct. 2854, 162 L. Ed. 2d 607 (2005).

14 Williamson v. Brevard County, 928 F.3d 1296 (11th Cir. 2019).
The Establishment Clause does not mandate the eradication of all religious symbols in the public sphere. Mayle v. United States, 891 F.3d 680 (7th Cir. 2018), cert. denied, 139 S. Ct. 823, 202 L. Ed. 2d 578 (2019).

15 Salazar v. Buono, 559 U.S. 700, 130 S. Ct. 1803, 176 L. Ed. 2d 634 (2010).

16 New Doe Child #1 v. United States, 901 F.3d 1015 (8th Cir. 2018), cert. denied, 139 S. Ct. 2699, 204 L. Ed. 2d 1092 (2019).

17 Salazar v. Buono, 559 U.S. 700, 130 S. Ct. 1803, 176 L. Ed. 2d 634 (2010).

18 School Dist. of Abington Tp., Pa. v. Schempp, 374 U.S. 203, 83 S. Ct. 1560, 10 L. Ed. 2d 844 (1963).

19 Town of Greece, N.Y. v. Galloway, 572 U.S. 565, 134 S. Ct. 1811, 188 L. Ed. 2d 835 (2014).

20 Salazar v. Buono, 559 U.S. 700, 130 S. Ct. 1803, 176 L. Ed. 2d 634 (2010).

21 Town of Greece, N.Y. v. Galloway, 572 U.S. 565, 134 S. Ct. 1811, 188 L. Ed. 2d 835 (2014); New Doe Child #1 v. United States, 901 F.3d 1015 (8th Cir. 2018), cert. denied, 139 S. Ct. 2699, 204 L. Ed. 2d 1092 (2019).

22 New Doe Child #1 v. United States, 901 F.3d 1015 (8th Cir. 2018), cert. denied, 139 S. Ct. 2699, 204 L. Ed. 2d 1092 (2019).

23 Town of Greece, N.Y. v. Galloway, 572 U.S. 565, 134 S. Ct. 1811, 188 L. Ed. 2d 835 (2014); New Doe Child #1 v. United States, 901 F.3d 1015 (8th Cir. 2018), cert. denied, 139 S. Ct. 2699, 204 L. Ed. 2d 1092 (2019).

24 Town of Greece, N.Y. v. Galloway, 572 U.S. 565, 134 S. Ct. 1811, 188 L. Ed. 2d 835 (2014).

25 New York v. United States Department of Health and Human Services, 414 F. Supp. 3d 475 (S.D. N.Y. 2019).

End of Document

**16A Am. Jur. 2d Constitutional Law § 429**

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**IX. Fundamental Constitutional Rights and Privileges**

**C. Particular Fundamental Constitutional Rights**

**1. First Amendment Rights Guaranteed by Constitution**

**b. Religious Freedom Guaranteed by Constitution**

**(2) "Establishment of Religion" Prohibited by Constitution**

# § 429. Separation of church and state under Establishment Clause of Constitution

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 1295 to 1301

**A.L.R. Library**

Construction and Application of Establishment Clause of First Amendment—United States Supreme Court Cases, 15 A.L.R. Fed. 2d 573

Historically, the idea of the founding fathers, embodied in the guarantee of the First Amendment's Establishment Clause, was that church and state be kept separate so that the legislative powers of the government could reach actions only and not opinions.[1] To that end, while some limited and incidental entanglement between church and state authority is inevitable in a complex modern society, the concept of a "wall" of separation is a useful signpost.[2] While the metaphor of a "wall" or impassable area between church and state, taken too literally, may mislead constitutional analysis, the Establishment Clause stands at least for the proposition that when government activities touch on the religious sphere, they must be secular in purpose, even-handed in operation, and neutral in primary impact.[3] Nevertheless, the Supreme Court has stated that the Constitution does not require a

  

complete separation of church and state; in fact, it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.[4] In every Establishment Clause case, it is necessary to reconcile the inescapable tension between the objective of preventing unnecessary intrusion of either church or state on the other and reality that total separation of the two is not possible.[5] In other words, the Establishment Clause does not demand strict separation between church and state in governmental words and deeds, even if that were somehow possible.[6] The characterization of the Establishment Clause as requiring a "wall of separation" between church and state has been described as a tiresome extra-judicial construct.[7]



Footnotes

1 People of State of Ill. ex rel. McCollum v. Board of Ed. of School Dist. No. 71, Champaign County, Ill., 333 U.S. 203, 68 S. Ct. 461, 92 L. Ed. 649, 2 A.L.R.2d 1338 (1948).

2 Larkin v. Grendel's Den, Inc., 459 U.S. 116, 103 S. Ct. 505, 74 L. Ed. 2d 297 (1982).

3 Gillette v. U.S., 401 U.S. 437, 91 S. Ct. 828, 28 L. Ed. 2d 168 (1971).

4 Lynch v. Donnelly, 465 U.S. 668, 104 S. Ct. 1355, 79 L. Ed. 2d 604 (1984).
Total separation of church and state is not required. Brown v. Gilmore, 258 F.3d 265, 155 Ed. Law Rep. 1031 (4th Cir. 2001); U.S. v. Indianapolis Baptist Temple, 224 F.3d 627 (7th Cir. 2000).
The First Amendment does not demand a wall of separation between church and state. American Civil Liberties Union of Kentucky v. Mercer County, Ky., 432 F.3d 624, 2005 FED App. 0477P (6th Cir. 2005).

5 Lynch v. Donnelly, 465 U.S. 668, 104 S. Ct. 1355, 79 L. Ed. 2d 604 (1984).
Total separation of church and state is not possible in the strict or absolute sense, nor is it required by the Constitution. Weinbaum v. Las Cruces Public Schools, 465 F. Supp. 2d 1116 (D.N.M. 2006); Rogers v. Mulholland, 858 F. Supp. 2d 213, 284 Ed. Law Rep. 233 (D.R.I. 2012).

6 Freedom from Religion Foundation, Inc. v. City of Warren, Mich., 707 F.3d 686 (6th Cir. 2013).

7 American Civil Liberties Union of Kentucky v. Mercer County, Ky., 432 F.3d 624, 2005 FED App. 0477P (6th Cir. 2005).

End of Document

# 16A Am. Jur. 2d Constitutional Law § 430

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**IX. Fundamental Constitutional Rights and Privileges**

**C. Particular Fundamental Constitutional Rights**

**1. First Amendment Rights Guaranteed by Constitution**

**b. Religious Freedom Guaranteed by Constitution**

**(2) "Establishment of Religion" Prohibited by Constitution**

## § 430. General tests for violation of Establishment Clause of Constitution

Topic Summary | Correlation Table | References

**West's Key Number Digest**

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Application, Recognition, or Consideration of Islamic Law by Courts in United States, 82 A.L.R.6th 1

Application, Recognition, or Consideration of Jewish Law by Courts in United States, 81 A.L.R.6th 1

Construction and Application of Establishment Clause of First Amendment—United States Supreme Court Cases, 15 A.L.R. Fed. 2d 573

Recent Supreme Court decisions note that it is not necessary to define the precise boundary of the Establishment Clause where history shows that the specific practice is permitted; any test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change.[1]

The application of the standard of strict scrutiny to Establishment Clause violations, requiring justification by a compelling state interest that is narrowly tailored to the objective,[2] first requires determining that there is an Establishment Clause violation.[3]

  

For this purpose, in *Lemon v. Kurtzman*, the United States Supreme Court devised a test which requires courts to draw lines with reference to the three main evils against which the Establishment Clause was intended to afford protection: sponsorship, financial support, and active involvement of the sovereign in religious activity.[4] Under this test, while a law may not "establish" a state religion, it may nevertheless be one "respecting" religion, in the sense of being a step that could lead to such establishment and hence offend the First Amendment.[5] Under the *Lemon v. Kurtzman* test, the criteria to be examined in determining whether a statute violates the Establishment Clause are:[6]

• whether the statute has a secular legislative purpose

• whether its primary effect is one that neither advances nor inhibits religion, and

• whether it fosters excessive government entanglement with religion

The test is sequential[7] and conjunctive; failing any prong of the test means that the government action cannot withstand Establishment Clause scrutiny.[8]

Under the test for a secular purpose, having just one secular purpose is sufficient.[9] While a legislature's stated reasons will generally get deference, the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective.[10] The state cannot hide behind the application of formally neutral criteria and remain studiously oblivious to the effects of its actions.[11] The inquiry whether a program's putative secular purpose is genuine and not merely secondary to a religious objective, is undertaken from the perspective of an objective observer, one who takes account of the traditional external signs that show up in the text, legislative history, and implementation of the statute, or comparable official act.[12] The objective observer is one presumed to be familiar with the history of the government's actions and competent to learn what history has to show.[13] What is important for secular legislative purpose prong of analysis is the overall legislative purpose of the allegedly unconstitutional provision, not a particular legislator's motive in supporting it.[14]

The test for whether a law at issue serves a secular legislative purpose, aims at preventing the relevant governmental decisionmaker from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters but does not require that the law's purpose be unrelated to religion, which would amount to a requirement that the government show a callous indifference to religious groups.[15] The Court asks whether government's actual purpose is to endorse or disapprove of religion, and whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval.[16]

Under the test for whether the law in question has the principal or primary effect of neither advancing nor inhibiting religion, a law is not unconstitutional simply because it allows churches to advance religion, which is their very purpose; instead, for the law to have forbidden effects it must be fair to say that the government itself has advanced religion through its own activities and influence in violation of the Establishment Clause.[17] This factor requires asking whether a reasonable observer acquainted with the text, history, and implementation of the challenged procedures would view them as a government endorsement of religion.[18] Governmental action has the primary effect of advancing or disapproving of religion if it is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices.[19] To ascertain the "principal or primary effect" prong, the Court asks, from the perspective of reasonable observer who is both informed and reasonable, and who is familiar with the history of the government practice at issue, whether it would be objectively reasonable for the challenged government action to be construed as sending primarily a message of either endorsement or disapproval of religion.[20]

  

In later cases, the Supreme Court applied the *Lemon v. Kurtzman* test by examining only the first and second of the factors, recasting the entanglement inquiry as simply one criterion relevant to determining a statute's effect, and acknowledging that its cases had pared somewhat the factors that could justify a finding of excessive entanglement. It then set out three primary criteria for determining a statute's effect: Government aid has the effect of advancing religion if it (1) results in governmental indoctrination, (2) defines its recipients by reference to religion, or (3) creates an excessive entanglement.[21] The hybrid test has three prongs, the first two of which focus on whether the government conduct was motivated by an intent to endorse religion or whether the conduct has the effect of endorsing religion, and, in certain cases where the government involves itself with a religious institution, the excessive entanglement prong comes into play.[22]

An endorsement test addresses the purpose prong of the *Lemon v. Kurtzman* test,[23] asking whether government's actual purpose is to endorse or disapprove of religion; if either the purpose or effect of the government activity is to endorse or disapprove of religion, the activity violates the Establishment Clause.[24] Under an endorsement test, a government unconstitutionally endorses religion in violation of the Establishment Clause whenever it appears to take a position on questions of religious belief, or makes adherence to a religion relevant in any way to a person's standing in the political community; the government creates this appearance when it conveys a message that religion is favored, preferred, or promoted over other beliefs.[25] Actions which have the effect of communicating governmental endorsement or disapproval of religion, whether intentionally or unintentionally, make religion relevant, in reality or public perception, to status in the political community, and thereby infringe Establishment Clause.[26]

The endorsement test may be met by showing government coercion of participation in religious activity, including not only securing participation through rules and threats of punishments but also imposing public pressure, or peer pressure, on individuals.[27] Coercion need not be direct, but can take the form of subtle coercive pressure that interferes with an individual's real choice about whether to participate in the activity at issue.[28] Unconstitutional coercion occurs where (1) the government directs (2) a formal religious exercise (3) in such a way as to oblige the participation of objectors.[29]



Footnotes

1 Town of Greece, N.Y. v. Galloway, 572 U.S. 565, 134 S. Ct. 1811, 188 L. Ed. 2d 835 (2014).

2 § 419.

3 Harkness v. Secretary of Navy, 858 F.3d 437 (6th Cir. 2017), cert. denied, 138 S. Ct. 2648, 201 L. Ed. 2d 1049 (2018).

4 Lemon v. Kurtzman, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971).

5 Lemon v. Kurtzman, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971).

6 Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 105 S. Ct. 2914, 86 L. Ed. 2d 557 (1985); Tony and Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290, 105 S. Ct. 1953, 85 L. Ed. 2d 278 (1985); Larson v. Valente, 456 U.S. 228, 102 S. Ct. 1673, 72 L. Ed. 2d 33 (1982); Lemon v. Kurtzman, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971); Jewish People for the Betterment of Westhampton Beach v. Village of Westhampton Beach, 778 F.3d 390 (2d Cir. 2015); American Humanist Association v. McCarty, 851 F.3d 521, 341 Ed. Law Rep. 579 (5th Cir. 2017); Harkness v. Secretary of Navy, 858 F.3d 437 (6th Cir. 2017), cert. denied, 138 S. Ct. 2648, 201 L. Ed. 2d 1049 (2018); Medina v. Catholic Health Initiatives, 877 F.3d 1213 (10th Cir. 2017); Foothill Communities Coalition v. County of Orange, 222 Cal. App. 4th 1302, 166 Cal. Rptr. 3d 627 (4th Dist. 2014).

7 Freedom From Religion Foundation, Inc. v. Chino Valley Unified School District Board of Education, 896 F.3d 1132, 356 Ed. Law Rep. 915 (9th Cir. 2018).

8 Nikolao v. Lyon, 875 F.3d 310 (6th Cir. 2017), cert. denied, 138 S. Ct. 1999, 201 L. Ed. 2d 251 (2018); Medina v. Catholic Health Initiatives, 877 F.3d 1213 (10th Cir. 2017).

9 Mayle v. United States, 891 F.3d 680 (7th Cir. 2018), cert. denied, 139 S. Ct. 823, 202 L. Ed. 2d 578 (2019).

10 McCreary County, Ky. v. American Civil Liberties Union of Ky., 545 U.S. 844, 125 S. Ct. 2722, 162 L. Ed. 2d 729, 15 A.L.R. Fed. 2d 865 (2005); Santa Fe Independent School Dist. v. Doe, 530 U.S. 290, 120 S. Ct. 2266, 147 L. Ed. 2d 295, 145 Ed. Law Rep. 21 (2000).

In determining whether a government action has a secular purpose, a government's characterization of its purpose is entitled to deference, although courts must ensure that the government's characterization is sincere. Neely-Bey Tarik-El v. Conley, 912 F.3d 989 (7th Cir. 2019).

A court generally accepts the government's stated rationale for its action but it is nonetheless the duty of the courts to distinguish a sham secular purpose from a sincere one, ensuring that the secular purpose required was genuine, not a sham, and not merely secondary to a religious objective. Satawa v. Macomb County Road Com'n, 689 F.3d 506 (6th Cir. 2012).

11 Santa Fe Independent School Dist. v. Doe, 530 U.S. 290, 120 S. Ct. 2266, 147 L. Ed. 2d 295, 145 Ed. Law Rep. 21 (2000).

12 McCreary County, Ky. v. American Civil Liberties Union of Ky., 545 U.S. 844, 125 S. Ct. 2722, 162 L. Ed. 2d 729, 15 A.L.R. Fed. 2d 865 (2005); Santa Fe Independent School Dist. v. Doe, 530 U.S. 290, 120 S. Ct. 2266, 147 L. Ed. 2d 295, 145 Ed. Law Rep. 21 (2000); Medina v. Catholic Health Initiatives, 877 F.3d 1213 (10th Cir. 2017).

13 McCreary County, Ky. v. American Civil Liberties Union of Ky., 545 U.S. 844, 125 S. Ct. 2722, 162 L. Ed. 2d 729, 15 A.L.R. Fed. 2d 865 (2005); Santa Fe Independent School Dist. v. Doe, 530 U.S. 290, 120 S. Ct. 2266, 147 L. Ed. 2d 295, 145 Ed. Law Rep. 21 (2000).

The reasonable observer is one who is aware of the history, purpose, and context of the act in question. Medina v. Catholic Health Initiatives, 877 F.3d 1213 (10th Cir. 2017).

14 Croft v. Governor of Texas, 562 F.3d 735, 243 Ed. Law Rep. 550 (5th Cir. 2009).

15 Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 107 S. Ct. 2862, 97 L. Ed. 2d 273 (1987).

16 Medina v. Catholic Health Initiatives, 877 F.3d 1213 (10th Cir. 2017).

17 Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 107 S. Ct. 2862, 97 L. Ed. 2d 273 (1987).

18 Harkness v. Secretary of Navy, 858 F.3d 437 (6th Cir. 2017), cert. denied, 138 S. Ct. 2648, 201 L. Ed. 2d 1049 (2018).

19 Access Fund v. U.S. Dept. of Agriculture, 499 F.3d 1036 (9th Cir. 2007).

20 Catholic League for Religious and Civil Rights v. City and County of San Francisco, 567 F.3d 595 (9th Cir. 2009), on reh'g en banc, 624 F.3d 1043 (9th Cir. 2010); Green v. Haskell County Board Of Com'rs, 568 F.3d 784 (10th Cir. 2009).

21 Mitchell v. Helms, 530 U.S. 793, 120 S. Ct. 2530, 147 L. Ed. 2d 660, 145 Ed. Law Rep. 44 (2000); Agostini v. Felton, 521 U.S. 203, 117 S. Ct. 1997, 138 L. Ed. 2d 391, 119 Ed. Law Rep. 29, 37 Fed. R. Serv. 3d 1051 (1997).

22 Weinbaum v. City of Las Cruces, N.M., 541 F.3d 1017, 236 Ed. Law Rep. 575 (10th Cir. 2008).

23 Smith v. Jefferson County Bd. of School Com'rs, 788 F.3d 580, 319 Ed. Law Rep. 17 (6th Cir. 2015); Fields v. City of Tulsa, 753 F.3d 1000 (10th Cir. 2014).

24 Smith v. Jefferson County Bd. of School Com'rs, 788 F.3d 580, 319 Ed. Law Rep. 17 (6th Cir. 2015).

25 American Humanist Association v. McCarty, 851 F.3d 521, 341 Ed. Law Rep. 579 (5th Cir. 2017).

26 Green v. Haskell County Board Of Com'rs, 568 F.3d 784 (10th Cir. 2009).

27 Smith v. Jefferson County Bd. of School Com'rs, 788 F.3d 580, 319 Ed. Law Rep. 17 (6th Cir. 2015).

A test for coercion looks to whether the government has coerced the plaintiff to support or participate in religion. Mayle v. United States, 891 F.3d 680 (7th Cir. 2018), cert. denied, 139 S. Ct. 823, 202 L. Ed. 2d 578 (2019).

28 Freedom From Religion Foundation v. Hanover School Dist., 626 F.3d 1, 262 Ed. Law Rep. 106 (1st Cir. 2010).

29 American Humanist Association v. McCarty, 851 F.3d 521, 341 Ed. Law Rep. 579 (5th Cir. 2017).

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**16A Am. Jur. 2d Constitutional Law § 431**

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# § 431. Incidental secular benefit or effect considered under Establishment Clause of Constitution

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 1295 to 1301

**A.L.R. Library**

Construction and Application of Establishment Clause of First Amendment—United States Supreme Court Cases, 15 A.L.R. Fed. 2d 573

A statute primarily having a secular effect does not violate the Establishment Clause of the First Amendment merely because it happens to coincide or harmonize with the tenets of some or all religions.[1] A law protecting a valid secular interest is not invalid as one "respecting an establishment of religion" merely because it also incidentally benefits one or more, or all, religions or because it incidentally enhances the capability of religion or religious institutions to survive in society.[2] A federal statute cannot be invalidated as serving some impermissible religious purpose simply because some of the goals of the statute (such as a reduction of problems associated with teenage sexuality) coincide with the beliefs of certain religious organizations.[3] The

  

happenstance that the Judeo-Christian religions oppose stealing does not mean that a state or federal government may not, consistent with the Establishment Clause, enact laws prohibiting larceny.[4] A federal statute which severely limits the use of federal funds to reimburse the cost of abortions under the Federal Medicaid program does not run afoul of the Establishment Clause, notwithstanding that funding restrictions therein may coincide with the religious tenets of the Roman Catholic Church.[5]

Government policies with secular objectives may incidentally benefit religion and not every governmental activity that confers remote, incidental, or indirect benefit upon religion is invalid under the Establishment Clause;[6] rather, the activity must have the principal or primary effect of advancing or endorsing religion.[7] That a group of religious practitioners' benefits in part from the government's policy does not establish endorsement of religion in violation of the Establishment Clause.[8] In other words, government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to the Establishment Clause just because the sectarian institutions may also receive an attenuated financial benefit.[9]



Footnotes

1 Hernandez v. C.I.R., 490 U.S. 680, 109 S. Ct. 2136, 104 L. Ed. 2d 766 (1989); Commack Self-Service Kosher Meats, Inc. v. Hooker, 680 F.3d 194 (2d Cir. 2012); Doe v. Parson, 368 F. Supp. 3d 1345 (E.D. Mo. 2019); Spicer v. Texas Workforce Com'n, 430 S.W.3d 526 (Tex. App. Dallas 2014).
A religious organization's enjoyment of merely "incidental" benefits does not violate Establishment Clause prohibition against the primary advancement of religion. Widmar v. Vincent, 454 U.S. 263, 102 S. Ct. 269, 70 L. Ed. 2d 440, 1 Ed. Law Rep. 13 (1981).
Simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause. ACLU Nebraska Foundation v. City of Plattsmouth, Neb., 419 F.3d 772 (8th Cir. 2005).

2 Committee For Public Ed. and Religious Liberty v. Nyquist, 413 U.S. 756, 93 S. Ct. 2955, 37 L. Ed. 2d 948 (1973); Hunt v. McNair, 413 U.S. 734, 93 S. Ct. 2868, 37 L. Ed. 2d 923 (1973).

3 Bowen v. Kendrick, 487 U.S. 589, 108 S. Ct. 2562, 101 L. Ed. 2d 520 (1988).

4 Harris v. McRae, 448 U.S. 297, 100 S. Ct. 2671, 65 L. Ed. 2d 784 (1980).

5 Harris v. McRae, 448 U.S. 297, 100 S. Ct. 2671, 65 L. Ed. 2d 784 (1980).

6 Green v. Haskell County Board Of Com'rs, 568 F.3d 784 (10th Cir. 2009); Foothill Communities Coalition v. County of Orange, 222 Cal. App. 4th 1302, 166 Cal. Rptr. 3d 627 (4th Dist. 2014).

7 Green v. Haskell County Board Of Com'rs, 568 F.3d 784 (10th Cir. 2009).

8 Access Fund v. U.S. Dept. of Agriculture, 499 F.3d 1036 (9th Cir. 2007).

9 Zobrest v. Catalina Foothills School Dist., 509 U.S. 1, 113 S. Ct. 2462, 125 L. Ed. 2d 1, 2 A.D.D. 176, 83 Ed. Law Rep. 930 (1993).
A New York City Board of Education's program of sending public schoolteachers into parochial schools to provide remedial education to disadvantaged children pursuant to a program mandated by Title I of the Federal Elementary and Secondary Education Act did not, as a matter of law, have the impermissible effect of advancing religion through indoctrination. Agostini v. Felton, 521 U.S. 203, 117 S. Ct. 1997, 138 L. Ed. 2d 391, 119 Ed. Law Rep. 29, 37 Fed. R. Serv. 3d 1051 (1997).

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# § 432. Neutrality requirement under Establishment Clause of Constitution

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 1297

**A.L.R. Library**

Construction and Application of Establishment Clause of First Amendment—United States Supreme Court Cases, 15 A.L.R. Fed. 2d 573

Under the Establishment Clause of the First Amendment, government neutrality is the standard.[1] A proper respect for the Establishment Clause compels the state to pursue a course of neutrality toward religion, favoring neither one religion over others nor religious adherents collectively over nonadherents,[2] and not choosing sides on matters of faith.[3] Neutrality between religion and religion and between religion and nonreligion is the touchstone in evaluating an Establishment Clause claim;[4] when the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality, there being no neutrality when the government's ostensible object is to take sides.[5] In this context, neutrality is considered in relation to relevant factors including the historical background of the decision under

  

challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decision-making body.[6]

Specifically, the government must be neutral when it comes to competition between sects.[7] The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief.[8]

The Establishment Clause principle of neutrality is not so rigid and absolute a principle as to command a brooding and pervasive devotion to the secular.[9] The proper neutral relationship of government to religion and religious institutions is not one of hostility and the neutrality required need not stem from a callous indifference to religion but even may at times be benevolent.[10] A government's religious accommodations may come packaged with benefits to secular entities without violating the Establishment Clause.[11] The guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse.[12] To pass muster under the Establishment Clause, government aid does not have to be handed out according to objective criteria only; all the law requires is that the government distribute funds in a manner that is neutral with respect to religion.[13]

In commanding neutrality, the Religion Clauses do not require the government to be oblivious to impositions that legitimate exercises of state power may place on religious belief and practice; the Establishment Clause allows neutrality which permits religious exercise without sponsorship.[14] Under the Establishment of Religion Clause of the First Amendment, government neutrality in matters of religion is not inconsistent with "benevolence" by way of exemptions from onerous duties so long as an exemption is tailored broadly enough that it reflects valid secular purposes.[15]

A regulation neutral on its face may, in its application, nevertheless offend the constitutional requirement of governmental neutrality if it unduly burdens the free exercise of religion.[16] Under the rule that a statute's principal or primary effect must be one that neither advances nor inhibits religion, in order to be valid under the Establishment Clause, aid normally may be thought to have a primary effect of advancing religion when it flows through an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting.[17]

While atheists do not call their own stance a religion, they are nonetheless entitled to the benefit of the neutrality principle, under which states cannot favor or disfavor religion versus comparable secular belief systems.[18]



Footnotes

1 Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Com'n, 138 S. Ct. 1719, 201 L. Ed. 2d 35 (2018); McCreary County, Ky. v. American Civil Liberties Union of Ky., 545 U.S. 844, 125 S. Ct. 2722, 162 L. Ed. 2d 729, 15 A.L.R. Fed. 2d 865 (2005); Rosenberger v. Rector and Visitors of University of Virginia, 515 U.S. 819, 115 S. Ct. 2510, 132 L. Ed. 2d 700, 101 Ed. Law Rep. 552 (1995); Center for Inquiry, Inc. v. Marion Circuit Court Clerk, 758 F.3d 869 (7th Cir. 2014); Freedom From Religion Foundation, Inc. v. Chino Valley Unified School District Board of Education, 896 F.3d 1132, 356 Ed. Law Rep. 915 (9th Cir. 2018); Williamson v. Brevard County, 928 F.3d 1296 (11th Cir. 2019).

2 Board of Educ. of Kiryas Joel Village School Dist. v. Grumet, 512 U.S. 687, 114 S. Ct. 2481, 129 L. Ed. 2d 546, 91 Ed. Law Rep. 810 (1994).

3 Lund v. Rowan County, North Carolina, 863 F.3d 268 (4th Cir. 2017), cert. denied, 138 S. Ct. 2564, 201 L. Ed. 2d 1101 (2018).

4 McCreary County, Ky. v. American Civil Liberties Union of Ky., 545 U.S. 844, 125 S. Ct. 2722, 162 L. Ed. 2d 729, 15 A.L.R. Fed. 2d 865 (2005); American Atheists, Inc. v. Port Authority of New York and New Jersey, 760 F.3d 227 (2d Cir. 2014); Doe ex rel. Doe v. Elmbrook School Dist., 687 F.3d 840, 282 Ed. Law Rep. 829 (7th Cir. 2012).

5 McCreary County, Ky. v. American Civil Liberties Union of Ky., 545 U.S. 844, 125 S. Ct. 2722, 162 L. Ed. 2d 729, 15 A.L.R. Fed. 2d 865 (2005).

6 Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Com'n, 138 S. Ct. 1719, 201 L. Ed. 2d 35 (2018).

7 Williamson v. Brevard County, 928 F.3d 1296 (11th Cir. 2019).

8 Commack Self-Service Kosher Meats, Inc. v. Hooker, 680 F.3d 194 (2d Cir. 2012).

9 American Atheists, Inc. v. Port Authority of New York and New Jersey, 760 F.3d 227 (2d Cir. 2014).

10 Rosenberger v. Rector and Visitors of University of Virginia, 515 U.S. 819, 115 S. Ct. 2510, 132 L. Ed. 2d 700, 101 Ed. Law Rep. 552 (1995); Committee For Public Ed. and Religious Liberty v. Nyquist, 413 U.S. 756, 93 S. Ct. 2955, 37 L. Ed. 2d 948 (1973).

11 Cutter v. Wilkinson, 544 U.S. 709, 125 S. Ct. 2113, 161 L. Ed. 2d 1020 (2005).

12 Good News Club v. Milford Central School, 533 U.S. 98, 121 S. Ct. 2093, 150 L. Ed. 2d 151, 154 Ed. Law Rep. 45 (2001).

13 American Jewish Congress v. Corporation for Nat'l. and Community Service, 399 F.3d 351, 195 Ed. Law Rep. 733 (D.C. Cir. 2005).

14 Board of Educ. of Kiryas Joel Village School Dist. v. Grumet, 512 U.S. 687, 114 S. Ct. 2481, 129 L. Ed. 2d 546, 91 Ed. Law Rep. 810 (1994).

It does not violate the Establishment Clause for a public university to grant access to its facilities on a religion neutral basis to a wide spectrum of student groups, including groups which use meeting rooms for sectarian activities, accompanied by some devotional exercises, and that is so even where the upkeep, maintenance, and repair of facilities attributed to those uses is paid from a student activity fund to which students are required to contribute. Rosenberger v. Rector and Visitors of University of Virginia, 515 U.S. 819, 115 S. Ct. 2510, 132 L. Ed. 2d 700, 101 Ed. Law Rep. 552 (1995).

15 Gillette v. U.S., 401 U.S. 437, 91 S. Ct. 828, 28 L. Ed. 2d 168 (1971).

16 Wisconsin v. Yoder, 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972).

17 Hunt v. McNair, 413 U.S. 734, 93 S. Ct. 2868, 37 L. Ed. 2d 923 (1973).

18 Center for Inquiry, Inc. v. Marion Circuit Court Clerk, 758 F.3d 869 (7th Cir. 2014).

End of Document

**16A Am. Jur. 2d Constitutional Law § 433**

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**IX. Fundamental Constitutional Rights and Privileges**

**C. Particular Fundamental Constitutional Rights**

**1. First Amendment Rights Guaranteed by Constitution**

**b. Religious Freedom Guaranteed by Constitution**

**(2) "Establishment of Religion" Prohibited by Constitution**

# § 433. Limits of accommodation of religion under Establishment Clause of Constitution; excessive entanglement

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 1300

**A.L.R. Library**

Construction and Application of Establishment Clause of First Amendment—United States Supreme Court Cases, 15 A.L.R. Fed. 2d 573

Under the First Amendment Establishment Clause, the government may accommodate religion and religious institutions as long as the end result of the accommodation does not excessively entangle the government in the affairs of religion nor result in government surveillance of religious activities.[1] For this purpose, the excessive entanglement test is one of kind[2] and degree.[3] Separation of church and state cannot mean the absence of all contact, since the complexities of modern life inevitably produce some contact.[4]

  

The government need not resign itself to ineffectual diffidence because of exaggerated fears of contagion of or by religion so long as neither intrudes unduly into the affairs of the other.[5] The inquiry into whether the challenged government action causes excessive state entanglement with religion rests on the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere.[6] However, while some involvement and entanglement between government and religion is inevitable, lines must be drawn.[7]

To establish excessive entanglement with religion, the plaintiffs must demonstrate sponsorship, financial support, and active involvement of the sovereign in religious activity.[8] Determining what amounts to excessive government entanglement requires examination of the character and purposes of the institutions that are benefitted, the nature of the aid that the state provides, and the resulting relationship between the government and the religious authority.[9] A court must bear in mind that excessive entanglement requires more than mere interaction between church and state, for some level of interaction has always been tolerated.[10] The advancement or inhibition of religion must be more than de minimis; the general rule is that to constitute excessive entanglement with religion the government action must involve intrusive government participation in, supervision of, or inquiry into religious affairs.[11]

Relationships between the government and a religious institution may result in excessive entanglement when essential governmental functions are delegated to religious entities.[12] Although some limited and incidental entanglement between church and state authority is inevitable in a complex modern society, when fusion of governmental and religious authority is an issue in Establishment Clause claim, the difference lies in the distinction between a government's purposeful delegation on the basis of religion and a delegation on principles neutral to religion, to individuals whose religious identities are incidental to their receipt of civic authority.[13]

Substantive entanglement appears when the government is placed in a position of deciding between competing religious views, while procedural entanglement appears when the state and church are pitted against one another in a protracted legal battle.[14] Routine administrative or compliance activities do not constitute impermissible interference of secular authorities in religious affairs in violation of the Establishment Clause.[15]

The principle of excessive government entanglement with religion extends to a religious institution's right to decide matters of faith, doctrine, and church governance.[16]



Footnotes

1 Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 105 S. Ct. 2914, 86 L. Ed. 2d 557 (1985); Larkin v. Grendel's Den, Inc., 459 U.S. 116, 103 S. Ct. 505, 74 L. Ed. 2d 297 (1982); Neely-Bey Tarik-El v. Conley, 912 F.3d 989 (7th Cir. 2019).
The First Amendment's Establishment Clause prevents excessive government entanglement with religion. Penn v. New York Methodist Hospital, 884 F.3d 416 (2d Cir. 2018), cert. denied, 139 S. Ct. 424, 202 L. Ed. 2d 317 (2018); Lee v. Sixth Mount Zion Baptist Church of Pittsburgh, 903 F.3d 113 (3d Cir. 2018); Nikolao v. Lyon, 875 F.3d 310 (6th Cir. 2017), cert. denied, 138 S. Ct. 1999, 201 L. Ed. 2d 251 (2018).

2 Wood v. Arnold, 915 F.3d 308, 362 Ed. Law Rep. 715 (4th Cir. 2019), cert. denied, 140 S. Ct. 399, 205 L. Ed. 2d 214 (2019).

3 Walz v. Tax Commission of City of New York, 397 U.S. 664, 90 S. Ct. 1409, 25 L. Ed. 2d 697 (1970); Wood v. Arnold, 915 F.3d 308, 362 Ed. Law Rep. 715 (4th Cir. 2019), cert. denied, 140 S. Ct. 399, 205 L. Ed. 2d 214 (2019).

4 Walz v. Tax Commission of City of New York, 397 U.S. 664, 90 S. Ct. 1409, 25 L. Ed. 2d 697 (1970).

A statute requiring that student religious groups be given the same access to schools as other noncurriculum-related student groups does not risk excessive entanglement between the government and religion. Board of Educ. of Westside Community Schools v. Mergens By and Through Mergens, 496 U.S. 226, 110 S. Ct. 2356, 110 L. Ed. 2d 191, 60 Ed. Law Rep. 320 (1990).

5 Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 109 S. Ct. 890, 103 L. Ed. 2d 1 (1989).

6 American Atheists, Inc. v. Port Authority of New York and New Jersey, 760 F.3d 227 (2d Cir. 2014).

7 Lemon v. Kurtzman, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971).

8 Neely-Bey Tarik-El v. Conley, 912 F.3d 989 (7th Cir. 2019).

9 Doe v. Indian River School Dist., 653 F.3d 256, 272 Ed. Law Rep. 44 (3d Cir. 2011); Nikolao v. Lyon, 875 F.3d 310 (6th Cir. 2017), cert. denied, 138 S. Ct. 1999, 201 L. Ed. 2d 251 (2018).

10 Doe v. Indian River School Dist., 653 F.3d 256, 272 Ed. Law Rep. 44 (3d Cir. 2011).

11 Vision Church v. Village of Long Grove, 468 F.3d 975 (7th Cir. 2006).

12 Smith v. Jefferson County Bd. of School Com'rs, 788 F.3d 580, 319 Ed. Law Rep. 17 (6th Cir. 2015).

13 Commack Self-Service Kosher Meats, Inc. v. Weiss, 294 F.3d 415 (2d Cir. 2002).

14 Rweyemamu v. Cote, 520 F.3d 198, 41 A.L.R. Fed. 2d 731 (2d Cir. 2008); Petruska v. Gannon University, 462 F.3d 294, 212 Ed. Law Rep. 598 (3d Cir. 2006).

15 Access Fund v. U.S. Dept. of Agriculture, 499 F.3d 1036 (9th Cir. 2007).

16 Lee v. Sixth Mount Zion Baptist Church of Pittsburgh, 903 F.3d 113 (3d Cir. 2018).

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# 16A Am. Jur. 2d Constitutional Law § 434

**American Jurisprudence, Second Edition** | May 2021 Update

**Constitutional Law**

Barbara J. Van Arsdale, J.D.; James Buchwalter, J.D; Paul M. Coltoff, J.D.; John A. Gebauer, J.D.; Lonnie E. Griffith, Jr., J.D.; Janice Holben, J.D.; Sonja Larsen, J.D.; Lucas Martin, J.D.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Karl Oakes, J.D.; Karen L. Schultz, J.D.; Jeffrey J. Shampo, J.D.; and Kimberly C. Simmons, J.D.

**IX. Fundamental Constitutional Rights and Privileges**

**C. Particular Fundamental Constitutional Rights**

**1. First Amendment Rights Guaranteed by Constitution**

**b. Religious Freedom Guaranteed by Constitution**

**(2) "Establishment of Religion" Prohibited by Constitution**

## § 434. Civil courts authority in ecclesiastical disputes under Establishment Clause of Constitution

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 1331

**A.L.R. Library**

Construction and Application of Church Autonomy Doctrine, 123 A.L.R.5th 385

Although the Supreme Court has found no violation of the First Amendment Establishment Clause in the use of civil courts by religious organizations to decide disputes,[1] the Supreme Court has pointed out that the First Amendment severely circumscribes the role that civil courts may play in resolving church property disputes,[2] since there is a substantial danger that the state will become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrinal beliefs.[3]

The Establishment Clause prohibits the government from inserting itself in theological disputes,[4] or questions of distribution of church property; the government may not dictate to houses of worship what to believe or how to implement and teach those

  

beliefs.[5] The First Amendment prohibits civil courts from resolving church property disputes on the basis of religious doctrine and practice and requires the civil courts to defer to the resolution of issues of religious doctrine or polity by the highest court of a hierarchical church organization, but subject to these limitations the First Amendment does not dictate that a state must follow a particular method of resolving church property disputes.[6] By adjudicating religious disputes, civil courts risk affecting associational conduct and thereby chilling the free exercise of religious beliefs, and by entering into a religious controversy and putting the enforcement power of the state behind a particular religious faction, a civil court risks "establishing" a religion.[7] These concerns require civil courts to abstain from deciding issues connected to theological controversy, church discipline, ecclesiastical government, or conformity of members of the church to the standard of morals required of them, and to accept as binding the decisions of religious organizations regarding the governance and discipline of their clergy.[8]

To permit civil courts to probe deeply enough into the allocation of power within a hierarchical church to decide religious law governing church polity violates the First Amendment in much the same manner as civil determination of religious doctrine; where resolution of disputes cannot be made without extensive inquiry by civil courts into religious law and polity, the First and 14th Amendments mandate that civil courts must not disturb the decisions of the highest ecclesiastical tribunal within a church of hierarchical polity but must accept such decisions as binding in their application to the religious issues of doctrine or polity before them.[9] A state is constitutionally entitled to adopt neutral principles of law, such as examination of the language of deeds, local church charters, state statutes, and provisions of the constitution of the general church, as a means of adjudicating church property disputes, but in undertaking such an examination the civil court must take special care to scrutinize the documents in purely secular terms, and if a deed, a corporate charter, or a constitution of the general church incorporates religious concepts in a provision relating to ownership of property so that interpretation of the instruments of ownership would require a civil court to resolve a religious controversy, the court must defer to resolution of the doctrinal issue by the authoritative ecclesiastical body.[10] In short, the First and 14th Amendments permit hierarchical religious organizations to establish their own rules and regulations for internal discipline and government and to create tribunals for adjudicating disputes over these matters; and when such choice is exercised and ecclesiastical tribunals are created to decide disputes over the government and direction of subordinate bodies, the Constitution requires that civil courts accept their decisions as binding upon them.[11]

Absent fraud or collusion, the First and 14th Amendments mandate that civil courts must not disturb the decisions of the highest ecclesiastical tribunal within a church of hierarchical policy but must accept such decisions as binding on them in their application to the religious issue of doctrine or polity before them.[12] Although there are constitutional limitations on the extent to which a civil court may inquire into and determine matters of ecclesiastical cognizance and polity in adjudicating intrachurch disputes, nevertheless the First and 14th Amendments do not prevent a civil court from independently examining and making the ultimate decision regarding the structure and actual operation of a hierarchical church and its constituent units in an action involving purely secular disputes between third parties and a particular defendant, albeit a religious affiliated organization, in which fraud, breach of contract, employment discrimination not based on religion, and statutory violations are alleged.[13]

The ecclesiastical abstention doctrine, or doctrine of church autonomy, as an exception to the general rule that the right of free exercise does not relieve an individual of the obligation to comply with valid and neutral laws of general applicability, does not apply to a church that is required to disclose subpoenaed documents as part of an investigation into allegations that church priests had sexually molested children, inasmuch as the case does not involve an internal church dispute but rather is a criminal investigation.[14]



Footnotes

1 Watson v. Jones, 80 U.S. 679, 20 L. Ed. 666, 1871 WL 14848 (1871).

2 Jones v. Wolf, 443 U.S. 595, 99 S. Ct. 3020, 61 L. Ed. 2d 775 (1979).

3 Serbian Eastern Orthodox Diocese for U. S. of America and Canada v. Milivojevich, 426 U.S. 696, 96 S. Ct. 2372, 49 L. Ed. 2d 151 (1976).

4 Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C., 565 U.S. 171, 132 S. Ct. 694, 181 L. Ed. 2d 650, 274 Ed. Law Rep. 774 (2012).

The district court lacked jurisdiction over a former church employee's claims against the church and its subordinate divisions and unions, challenging the termination of the employee's retirement benefits for not remaining a member of good standing, since the dispute involved the application of church doctrine and procedure and implicated both the Establishment and Free Exercise Clauses of First Amendment; claims were predicated on employee's defrocking, excommunication, and the termination of retirement benefits due to a "theological disagreement" and would have required encroachment into matters of church dogma and governance. Myhre v. Seventh-Day Adventist Church Reform Movement American Union International Missionary Society, 719 Fed. Appx. 926 (11th Cir. 2018), cert. denied, 139 S. Ct. 175, 202 L. Ed. 2d 107 (2018).

5 Real Alternatives, Inc. v. Secretary Department of Health and Human Services, 867 F.3d 338 (3d Cir. 2017).

6 Jones v. Wolf, 443 U.S. 595, 99 S. Ct. 3020, 61 L. Ed. 2d 775 (1979).

Civil courts lack jurisdiction to entertain disputes involving church doctrine and polity, under the First Amendment, as civil actions involving ecclesiastical disputes implicate both the Establishment and Free Exercise Clauses. Myhre v. Seventh-Day Adventist Church Reform Movement American Union International Missionary Society, 719 Fed. Appx. 926 (11th Cir. 2018), cert. denied, 139 S. Ct. 175, 202 L. Ed. 2d 107 (2018).

7 Crowder v. Southern Baptist Convention, 828 F.2d 718 (11th Cir. 1987).

8 Myhre v. Seventh-Day Adventist Church Reform Movement American Union International Missionary Society, 719 Fed. Appx. 926 (11th Cir. 2018), cert. denied, 139 S. Ct. 175, 202 L. Ed. 2d 107 (2018).

9 Serbian Eastern Orthodox Diocese for U. S. of America and Canada v. Milivojevich, 426 U.S. 696, 96 S. Ct. 2372, 49 L. Ed. 2d 151 (1976).

10 Jones v. Wolf, 443 U.S. 595, 99 S. Ct. 3020, 61 L. Ed. 2d 775 (1979).

11 Serbian Eastern Orthodox Diocese for U. S. of America and Canada v. Milivojevich, 426 U.S. 696, 96 S. Ct. 2372, 49 L. Ed. 2d 151 (1976).

12 Jones v. Wolf, 443 U.S. 595, 99 S. Ct. 3020, 61 L. Ed. 2d 775 (1979).

13 General Council on Finance and Administration of United Methodist Church v. Superior Court of California, San Diego County, 439 U.S. 1355, 439 U.S. 1369, 99 S. Ct. 35, 58 L. Ed. 2d 63, 58 L. Ed. 2d 77 (1978).

A professional negligence claim could not be isolated from the inherently religious church-disciplinary process in which the disclosure to church elders occurred, and thus, the Free Exercise Clause precluded a civil court from exercising subject-matter jurisdiction over such claim. C.L. Westbrook, Jr. v. Penley, 231 S.W.3d 389 (Tex. 2007).

14 Roman Catholic Archbishop of Los Angeles v. Superior Court, 131 Cal. App. 4th 417, 32 Cal. Rptr. 3d 209 (2d Dist. 2005), as modified on other grounds on denial of reh'g, (Aug. 16, 2005); People v. Campobello, 348 Ill. App. 3d 619, 284 Ill. Dec. 654, 810 N.E.2d 307, 123 A.L.R.5th 761 (2d Dist. 2004); Society of Jesus of New England v. Com., 441 Mass. 662, 808 N.E.2d 272 (2004).

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# 16A Am. Jur. 2d Constitutional Law § 435

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**IX. Fundamental Constitutional Rights and Privileges**

**C. Particular Fundamental Constitutional Rights**

**1. First Amendment Rights Guaranteed by Constitution**

**b. Religious Freedom Guaranteed by Constitution**

**(3) "Free Exercise" of Religion Guaranteed by Constitution and Statute**

## § 435. Nature and purpose of Free Exercise Clause of Constitution

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 1303

**Trial Strategy**

Interference With the Right to Free Exercise of Religion, 63 Am. Jur. Proof of Facts 3d 195

The Free Exercise Clause[1] of First Amendment to the United States Constitution provides, inter alia, that "Congress shall make no law … prohibiting the free exercise" of religion.[2] The right to the free exercise of religion is fundamental[3] and means, first and foremost, the right to believe and profess whatever religious doctrine one desires.[4] A law targeting religious beliefs as such is never permissible under the Free Exercise Clause.[5] The door of the Free Exercise Clause is tightly closed against any governmental regulation of religious beliefs as such.[6]

The Free Exercise Clause is interpreted to mean that the government is prohibited from interfering with or attempting to regulate any person's religious beliefs, from coercing a person to affirm beliefs repugnant to the person's religion or conscience, and

  

from directly penalizing or discriminating against a person for holding beliefs contrary to those held by anyone else.[7] The government cannot impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices.[8] The Free Exercise Clause excludes all governmental regulation of religious beliefs as such, meaning that the government may not compel affirmation of religious belief, punish the expression of religious doctrines it believes to be false, impose special disabilities on the basis of religious views or religious status, or lend its power to one or the other side in controversies over religious authority or dogma.[9]

The Free Exercise Clause of the First Amendment constitutes an absolute prohibition against governmental regulation of religious beliefs.[10] Freedom of conscience and freedom to adhere to such religious organization or form of worship as an individual may choose cannot be restricted by law.[11] The Free Exercise Clause protects against laws that impose special disabilities on basis of religious status.[12] Free Exercise Clause protects religious observers against unequal treatment;[13] in other words, the government cannot in a selective manner impose burdens only on conduct motivated by religious belief.[14] One suffers an injury to free exercise rights when the state compels one to do or refrain from doing an act forbidden or required by one's religion, or to affirm or disavow a belief forbidden or required by one's religion.[15] The Free Exercise Clause prevents religious speakers from being targeted for exclusion from a generally available benefit.[16]

The Constitution places beyond the reach of the law the affirmative pursuit of one's convictions about the ultimate mystery of the universe and humanity's relation to it.[17] Courts, no more than constitutions, can intrude into the consciences of persons or compel them to believe contrary to their faith or think contrary to their convictions.[18] The Free Exercise Clause withdraws from legislative power, both state and federal, the exertion of any restraint on the free exercise of religion since the clause's purpose was to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority; hence, it is necessary in a free exercise case for one to show the coercive effect of an enactment as it operates against the individual in the practice of a religion.[19]

Locating the line between unconstitutional prohibitions on the free exercise of religion and legitimate conduct by the government of its own affairs cannot depend on measuring the effects of governmental action on a religious objector's spiritual development.[20] The Free Exercise Clause does not require the government to conduct its internal affairs in ways that comport with the religious beliefs of particular citizens.[21]

The freedom of individual belief is absolute, but the freedom of individual conduct is not.[22] The Free Exercise Clause does not relieve individuals from the obligation to comply with a valid and neutral law of general applicability, which is rationally related to a legitimate government interest, as conduct remains subject to regulation for the protection of society.[23] Nonetheless, the exercise of religion, for purposes of the Free Exercise Clause, involves not only belief and profession, but the performance of, or abstention from, physical acts that are engaged in for religious reasons,[24] such as assembling with others for worship service, participating in sacramental use of bread and wine, proselytizing, or abstaining from certain foods or certain modes of transportation.[25] The free exercise of religion includes right to engage in conduct that is motivated by religious beliefs held by the individual asserting the claim.[26] The Free Exercise Clause guarantees that government will not impinge on the freedom of individuals to celebrate their faiths, in the day-to-day, or in life's grand moments.[27]

The Free Exercise Clause extends to religious organizations the same right to be free from governmental coercion as is extended to individuals,[28] and safeguards the practice of religion whether as an individual or as part of a group.[29] The Free Exercise Clause protects not only the individual's right to believe and profess whatever religious doctrine one desires, but also a religious institution's right to decide matters of faith, doctrine, and church governance.[30] The Free Exercise Clause is not a purely personal

  

guarantee unavailable to corporations and other organizations because the historic function of the particular constitutional guarantee has been limited to the protection of individuals.[31]

While the Free Exercise Clause forbids government acts specifically designed to suppress religiously motivated practices or conduct,[32] the Free Exercise Clause is not limited to acts motivated by overt religious hostility or prejudice; its animating ideal is to protect the free exercise of religion from unwarranted governmental inhibition whatever its source.[33] The absence of subjective hostility by the government is not relevant to the issue of whether the government violates the Free Exercise Clause.[34] Proof of hostility or discriminatory motivation may be sufficient to prove that a challenged governmental action is not neutral, but the Free Exercise Clause is not confined to actions based on animus.[35]

**CUMULATIVE SUPPLEMENT**

**Cases:**

In context of challenges to government action under the Free Exercise Clause, distinctions must be drawn between those governmental actions that actually interfere with the exercise of religion, and those that merely require or result in exposure to attitudes and outlooks at odds with perspective prompted by religion; government action that merely offends religious beliefs does not violate the Free Exercise Clause, since an actual burden on the profession or exercise of religion is required. U.S. Const. Amend. 1. Sabra v. Maricopa County Community College District, 479 F. Supp. 3d 808 (D. Ariz. 2020).

**[END OF SUPPLEMENT]**



Footnotes

1 Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Com'n, 138 S. Ct. 1719, 201 L. Ed. 2d 35 (2018); Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 198 L. Ed. 2d 551 (2017); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 134 S. Ct. 2751, 189 L. Ed. 2d 675 (2014).

2 U.S. Const. Amends. I.

3 Hassan v. City of New York, 804 F.3d 277 (3d Cir. 2015), as amended (Feb. 2, 2016).

4 Employment Div., Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990), overturned due to legislative action, 42 U.S.C.A. ? 2000bb (Nov. 16, 1993); In re Kemp, 894 F.3d 900 (8th Cir. 2018), cert. denied, 139 S. Ct. 1176, 203 L. Ed. 2d 199 (2019); Parents for Privacy v. Barr, 949 F.3d 1210, 374 Ed. Law Rep. 401 (9th Cir. 2020); North Coast Women's Care Medical Group, Inc. v. Superior Court, 44 Cal. 4th 1145, 81 Cal. Rptr. 3d 708, 189 P.3d 959 (2008).

5 Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 198 L. Ed. 2d 551 (2017); Central Rabbinical Congress of U.S. & Canada v. New York City Dept. of Health & Mental Hygiene, 763 F.3d 183 (2d Cir. 2014).

6 Sherbert v. Verner, 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963).

7 School Dist. of Abington Tp., Pa. v. Schempp, 374 U.S. 203, 83 S. Ct. 1560, 10 L. Ed. 2d 844 (1963).

8 Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Com'n, 138 S. Ct. 1719, 201 L. Ed. 2d 35 (2018).

9 Central Rabbinical Congress of U.S. & Canada v. New York City Dept. of Health & Mental Hygiene, 763 F.3d 183 (2d Cir. 2014); In re Kemp, 894 F.3d 900 (8th Cir. 2018), cert. denied, 139 S. Ct. 1176, 203 L. Ed. 2d 199 (2019); Parents for Privacy v. Barr, 949 F.3d 1210, 374 Ed. Law Rep. 401 (9th Cir. 2020).

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11 School Dist. of Abington Tp., Pa. v. Schempp, 374 U.S. 203, 83 S. Ct. 1560, 10 L. Ed. 2d 844 (1963).

12 Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 198 L. Ed. 2d 551 (2017); Illinois Bible Colleges Association v. Anderson, 870 F.3d 631, 347 Ed. Law Rep. 121 (7th Cir. 2017), as amended, (Oct. 5, 2017) and cert. denied, 138 S. Ct. 1021, 200 L. Ed. 2d 257 (2018).

13 Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 198 L. Ed. 2d 551 (2017); Listecki v. Official Committee of Unsecured Creditors, 780 F.3d 731 (7th Cir. 2015).

14 Listecki v. Official Committee of Unsecured Creditors, 780 F.3d 731 (7th Cir. 2015).

15 Nikolao v. Lyon, 875 F.3d 310 (6th Cir. 2017), cert. denied, 138 S. Ct. 1999, 201 L. Ed. 2d 251 (2018).

16 Archdiocese of Washington v. Washington Metropolitan Area Transit Authority, 897 F.3d 314 (D.C. Cir. 2018).

17 Minersville School Dist. v. Gobitis, 310 U.S. 586, 60 S. Ct. 1010, 84 L. Ed. 1375, 127 A.L.R. 1493 (1940) (overruled on other grounds by, West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628, 147 A.L.R. 674 (1943)).

18 Fowler v. State of R.I., 345 U.S. 67, 73 S. Ct. 526, 97 L. Ed. 828 (1953).

19 School Dist. of Abington Tp., Pa. v. Schempp, 374 U.S. 203, 83 S. Ct. 1560, 10 L. Ed. 2d 844 (1963).

20 Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 108 S. Ct. 1319, 99 L. Ed. 2d 534 (1988).
The government, in blocking assets of an Islamic relief organization found to be a branch of an organization which had been designated a Specially Designated Global Terrorist (SDGT), did not violate the First Amendment right to free exercise of religion of the organization's members. Islamic American Relief Agency v. Gonzales, 477 F.3d 728 (D.C. Cir. 2007) (the organization argued that the blocking "substantially burdens" the religious exercise of its members because they intended their donations to fulfill their religious obligation to engage in humanitarian charitable giving).

21 Bowen v. Roy, 476 U.S. 693, 106 S. Ct. 2147, 90 L. Ed. 2d 735 (1986); Anspach ex rel. Anspach v. City of Philadelphia, Dept. of Public Health, 503 F.3d 256 (3d Cir. 2007).
The First Amendment does not require the government itself to behave in ways that the individual believes will further the individual's spiritual development or that of the individual's family. Cornerstone Christian Schools v. University Interscholastic League, 563 F.3d 127, 243 Ed. Law Rep. 609 (5th Cir. 2009).

22 Parents for Privacy v. Barr, 949 F.3d 1210, 374 Ed. Law Rep. 401 (9th Cir. 2020).

23 Parents for Privacy v. Barr, 949 F.3d 1210, 374 Ed. Law Rep. 401 (9th Cir. 2020).

24 Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 134 S. Ct. 2751, 189 L. Ed. 2d 675 (2014); Central Rabbinical Congress of U.S. & Canada v. New York City Dept. of Health & Mental Hygiene, 763 F.3d 183 (2d Cir. 2014).

25 Central Rabbinical Congress of U.S. & Canada v. New York City Dept. of Health & Mental Hygiene, 763 F.3d 183 (2d Cir. 2014).

26 Bible Believers v. Wayne County, Mich., 805 F.3d 228 (6th Cir. 2015).

27 Doe ex rel. Doe v. Elmbrook School Dist., 687 F.3d 840, 282 Ed. Law Rep. 829 (7th Cir. 2012).

28 Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America, 344 U.S. 94, 73 S. Ct. 143, 97 L. Ed. 120 (1952); Duquesne University of the Holy Spirit v. National Labor Relations Board, 947 F.3d 824, 374 Ed. Law Rep. 46 (D.C. Cir. 2020).

29 Duquesne University of the Holy Spirit v. National Labor Relations Board, 947 F.3d 824, 374 Ed. Law Rep. 46 (D.C. Cir. 2020).

30 Lee v. Sixth Mount Zion Baptist Church of Pittsburgh, 903 F.3d 113 (3d Cir. 2018).

31 Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 82 A.L.R. Fed. 2d 723 (10th Cir. 2013), aff'd, 573 U.S. 682, 134 S. Ct. 2751, 189 L. Ed. 2d 675 (2014).

32 Fulton v. City of Philadelphia, 922 F.3d 140 (3d Cir. 2019), cert. granted, 2020 WL 871694 (U.S. 2020).

33 Shrum v. City of Coweta, Okla., 449 F.3d 1132 (10th Cir. 2006).

34 Hassan v. City of New York, 804 F.3d 277 (3d Cir. 2015), as amended (Feb. 2, 2016).

35 Shrum v. City of Coweta, Okla., 449 F.3d 1132 (10th Cir. 2006).

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# 16A Am. Jur. 2d Constitutional Law § 436

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**IX. Fundamental Constitutional Rights and Privileges**

**C. Particular Fundamental Constitutional Rights**

**1. First Amendment Rights Guaranteed by Constitution**

**b. Religious Freedom Guaranteed by Constitution**

**(3) "Free Exercise" of Religion Guaranteed by Constitution and Statute**

## § 436. Religious beliefs protected by Free Exercise Clause of Constitution; secularism and orthodoxy

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 1305

Only beliefs rooted in religion are protected by the Free Exercise Clause of the First Amendment, which, by its terms, gives special protection to the exercise of religion. Religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.[1] However, the Free Exercise Clause does not protect purely secular views[2] or personal preferences.[3] The first questions in any Free Exercise Clause claim are whether the plaintiff's beliefs are religious in nature and whether those religious beliefs are sincerely held.[4] The belief must be one rooted in religion,[5] but it need not appear that a tenet or belief is central to or mandated by religious doctrine[6] nor that the beliefs in question are shared by all members of a religious sect.[7] Intrafaith differences are not uncommon among followers of a particular creed, and the judicial process is singularly ill equipped to resolve such differences.[8] That the belief is religious in nature and sincerely held is a question for the individual's scheme of things.[9] The courts have understandably shied away from attempting to gauge how central a sincerely held belief is to the believer's religion, and what constitutes a sincerely held religious belief, for purposes of the Free Exercise Clause, is not a probing inquiry.[10] It is no more appropriate for judges to determine the centrality of religious beliefs before applying a compelling interest test in the free exercise field than it would be for them to determine the importance of ideas before applying the compelling interest test in the free speech field.[11] In the context of a claim under the Free Exercise

  

Clause of the First Amendment, the indicia used to determine whether a proffered viewpoint is in fact religious or secular in nature includes (1) an attempt to address fundamental and ultimate questions involving deep and imponderable matters, (2) a comprehensive belief system, and (3) the presence of formal and external signs like clergy and observance of holidays.[12]

The Free Exercise Clause does not merely extend to the protection of orthodox religious beliefs and practices but also protects unorthodox religious beliefs and most practices[13] and the right to hold no religious belief, as well.[14] The right to espouse any religious faith or any political cause short of one dedicated to the overthrow of the government by force carries with it the cognate right to engage as its champion in the proselytization of followers or converts to the favored cause or faith.[15] One who makes a profession of evangelism is not in a less preferred position, as respects the protection afforded by the First Amendment, than the casual religious worker.[16]

Religious beliefs protected by the Free Exercise Clause need not involve worship of a supreme being.[17] Atheism is a school of thought that takes a position on religion, the existence and importance of a supreme being, and a code of ethics, and it is thus a belief system that is protected by the Free Exercise Clause.[18]



Footnotes

1 Thomas v. Review Bd. of Indiana Employment Sec. Division, 450 U.S. 707, 101 S. Ct. 1425, 67 L. Ed. 2d 624 (1981); Fifth Ave. Presbyterian Church v. City of New York, 293 F.3d 570 (2d Cir. 2002).

2 Cambridge Christian School, Inc. v. Florida High School Athletic Association, Inc., 942 F.3d 1215, 371 Ed. Law Rep. 759 (11th Cir. 2019).
A Free Exercise claim cannot be rooted in purely secular philosophical concerns. Walker v. Beard, 789 F.3d 1125 (9th Cir. 2015).

3 Cambridge Christian School, Inc. v. Florida High School Athletic Association, Inc., 942 F.3d 1215, 371 Ed. Law Rep. 759 (11th Cir. 2019).

4 DeMarco v. Davis, 914 F.3d 383 (5th Cir. 2019), cert. denied, 140 S. Ct. 250, 205 L. Ed. 2d 174 (2019); Maye v. Klee, 915 F.3d 1076 (6th Cir. 2019); Walker v. Beard, 789 F.3d 1125 (9th Cir. 2015); Cambridge Christian School, Inc. v. Florida High School Athletic Association, Inc., 942 F.3d 1215, 371 Ed. Law Rep. 759 (11th Cir. 2019).

5 Cambridge Christian School, Inc. v. Florida High School Athletic Association, Inc., 942 F.3d 1215, 371 Ed. Law Rep. 759 (11th Cir. 2019).

6 Kay v. Bemis, 500 F.3d 1214 (10th Cir. 2007); Watts v. Florida Intern. University, 495 F.3d 1289, 223 Ed. Law Rep. 147 (11th Cir. 2007).

7 Cambridge Christian School, Inc. v. Florida High School Athletic Association, Inc., 942 F.3d 1215, 371 Ed. Law Rep. 759 (11th Cir. 2019).

8 A.A. ex rel. Betenbaugh v. Needville Indep. School Dist., 611 F.3d 248, 258 Ed. Law Rep. 955 (5th Cir. 2010).

9 Maye v. Klee, 915 F.3d 1076 (6th Cir. 2019).

10 Cambridge Christian School, Inc. v. Florida High School Athletic Association, Inc., 942 F.3d 1215, 371 Ed. Law Rep. 759 (11th Cir. 2019).

11 Employment Div., Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990), overturned due to legislative action, 42 U.S.C.A. ? 2000bb (Nov. 16, 1993).

12 Sutton v. Rasheed, 323 F.3d 236 (3d Cir. 2003), as amended on other grounds, (May 29, 2003).

13 U.S. v. Ballard, 322 U.S. 78, 64 S. Ct. 882, 88 L. Ed. 1148 (1944); Follett v. Town of McCormick, S.C., 321 U.S. 573, 64 S. Ct. 717, 88 L. Ed. 938, 152 A.L.R. 317 (1944); Murdock v. Com. of Pennsylvania, 319 U.S. 105, 63 S. Ct. 870, 87 L. Ed. 1292, 146 A.L.R. 81 (1943).

City ordinances which regulated the practice of animal sacrifice but which effectively prohibited only animal sacrifice as practiced by the Saneria religion were violative of the Free Exercise Clause. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993).

14 McGowan v. State of Md., 366 U.S. 420, 81 S. Ct. 1101, 6 L. Ed. 2d 393 (1961), for additional opinion, see, 366 U.S. 420, 81 S. Ct. 1153, 6 L. Ed. 2d 393 (1961).

15 Niemotko v. State of Md., 340 U.S. 268, 71 S. Ct. 325, 95 L. Ed. 267 (1951).

16 Fowler v. State of R.I., 345 U.S. 67, 73 S. Ct. 526, 97 L. Ed. 828 (1953); Follett v. Town of McCormick, S.C., 321 U.S. 573, 64 S. Ct. 717, 88 L. Ed. 938, 152 A.L.R. 317 (1944).

17 Kaufman v. Pugh, 733 F.3d 692 (7th Cir. 2013).

18 Kaufman v. Pugh, 733 F.3d 692 (7th Cir. 2013).

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**16A Am. Jur. 2d Constitutional Law § 437**

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# § 437. Statutory protection of free exercise of religion

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 1303 to 1308

**A.L.R. Library**

Validity, Construction, and Operation of State Religious Freedom Restoration Acts, 116 A.L.R.5th 233
Validity, construction, and application of Religious Freedom Restoration Act (42 U.S.C.A. secs. 2000bb et seq.), 135 A.L.R. Fed. 121

Federal statutes pertaining to the free exercise of religion include the congressionally enacted Religious Freedom Restoration Act of 1993 (RFRA)[1] and the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA).[2] RFRA provides that government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in the designated section of RFRA.[3]

  

RFRA is unconstitutional as applied to states and their political subdivisions[4] but still applies to the federal government.[5] As applied to a federal agency, RFRA is based on the enumerated power that supports the particular agency's work.[6]

For purposes of RFRA, the exercise of religion, as under the Free Exercise Clause, involves not only belief and profession, but the performance of, or abstention from, physical acts that are engaged in for religious reasons.[7] To qualify for RFRA's protection, an asserted religious belief must be sincere, and a corporation's pretextual assertion of a religious belief in order to obtain an exemption for financial reasons would fail.[8]

In RFRA cases, when determining whether a substantial burden on the exercise of religion is in furtherance of a compelling governmental interest, the Court must look beyond broadly formulated interests and scrutinize the asserted harm of granting specific exemptions to particular religious claimants.[9] RFRA's least restrictive means standard, applied to substantial burdens on the exercise of religion, is exceptionally demanding, providing even broader protection for religious liberty than was available under prior decisions.[10]



Footnotes

1 42 U.S.C.A. §§ 2000bb-1 et seq.

2 § 454.

3 42 U.S.C.A. § 2000bb-1(a).

4 City of Boerne v. Flores, 521 U.S. 507, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997).

5 Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 126 S. Ct. 1211, 163 L. Ed. 2d 1017 (2006).

6 Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 134 S. Ct. 2751, 189 L. Ed. 2d 675 (2014).

7 Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 134 S. Ct. 2751, 189 L. Ed. 2d 675 (2014).

8 Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 134 S. Ct. 2751, 189 L. Ed. 2d 675 (2014).

9 Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 134 S. Ct. 2751, 189 L. Ed. 2d 675 (2014).

10 Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 134 S. Ct. 2751, 189 L. Ed. 2d 675 (2014).

**End of Document**

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**IX. Fundamental Constitutional Rights and Privileges**

**C. Particular Fundamental Constitutional Rights**

**1. First Amendment Rights Guaranteed by Constitution**

**b. Religious Freedom Guaranteed by Constitution**

**(3) "Free Exercise" of Religion Guaranteed by Constitution and Statute**

## § 438. Tests of governmental regulation of free exercise of religion

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 1303 to 1308

**Trial Strategy**

Interference With the Right to Free Exercise of Religion, 63 Am. Jur. Proof of Facts 3d 195

A claim challenging government action or a law under the Free Exercise Clause of the United States Constitution, depending on the nature of the challenged law or government action, is subject to strict scrutiny for justification by a compelling governmental interest, and a requirement that it be narrowly tailored to advance that interest,[1] or review for a rational basis, meaning a rational relationship to a legitimate governmental interest.[2]

Neutral, generally applicable laws that incidentally burden a particular religious practice do not have to be justified by a compelling governmental interest to survive a challenge under the Free Exercise Clause.[3]

  

A religious objector has no federal constitutional right to an exemption from a neutral and valid law of general applicability on the ground that compliance with that law is contrary to the objector's religious beliefs; the law need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.[4] A law that is both neutral and generally applicable need only be rationally related to a legitimate governmental interest to survive a constitutional challenge under the Free Exercise Clause,[5] The Free Exercise Clause is not violated by a neutral law even if a particular group, motivated by religion, may be more likely to engage in the proscribed conduct.[6]

A law that burdens a religious practice or belief, and that is not neutral or generally applicable, is subject to strict scrutiny and narrow tailoring to advance a compelling government interest.[7] Only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion; only the gravest abuses, endangering paramount interests, give occasion for permissible limitation and the regulated conduct must pose some substantial threat to public safety, peace, or order.[8]

A law is neutral so long as its object is something other than the infringement or restriction of religious practices.[9] A law is not neutral if it has as its object to infringe upon or restrict practices because of their religious motivation.[10] A law lacks facial neutrality, for purposes of determining the level of scrutiny for a violation of the Free Exercise Clause, if it refers to a religious practice without a secular meaning discernable from the language or context.[11] In addition, facial neutrality of a law is not determinative of whether law violates the Free Exercise Clause since official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality.[12]

A law is not generally applicable, for purposes of determining the level of scrutiny for a violation of the Free Exercise Clause, if it, in a selective manner, imposes burdens only on conduct motivated by religious belief, or if its prohibitions substantially under-include nonreligiously motivated conduct that might endanger the same governmental interest that the law is designed to protect.[13] A law is not generally applicable when it proscribes particular conduct only or primarily when religiously motivated.[14] The neutrality standard is, however, subject to exceptions by which heighten scrutiny applies.[15] Under the "hybrid rights" exception, when a free exercise claim is coupled with some other constitutional claim (such a free speech claim), heightened scrutiny may be appropriate.[16] In addition, under the "individualized exemption" exception, where a state's facially neutral rule contains a system of individualized exemptions, a state may not refuse to extend that system to cases of religious hardship without a compelling reason.[17]

The Free Exercise Clause's mandate of neutrality toward religion prohibits the government from deciding that secular motivations are more important than religious motivations. Accordingly, in situations where government officials exercise discretion in applying a facially neutral law so that whether they enforce the law depends on their evaluation of the reasons underlying a violator's conduct, they contravene the neutrality requirement if they exempt some secularly motivated conduct but not comparable religiously motivated conduct.[18]



Footnotes

1 Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 198 L. Ed. 2d 551 (2017); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 134 S. Ct. 2751, 189 L. Ed. 2d 675 (2014); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993); Central Rabbinical Congress of U.S. & Canada v. New York City Dept. of Health & Mental Hygiene, 763 F.3d 183 (2d Cir. 2014); New Doe Child #1 v. Congress of United States, 891 F.3d 578 (6th Cir. 2018); Illinois Bible Colleges Association v. Anderson, 870 F.3d 631, 347 Ed. Law Rep. 121 (7th Cir. 2017), as amended, (Oct. 5,

2017) and cert. denied, 138 S. Ct. 1021, 200 L. Ed. 2d 257 (2018); Stormans, Inc. v. Wiesman, 794 F.3d 1064 (9th Cir. 2015); Magazu v. Department of Children and Families, 473 Mass. 430, 42 N.E.3d 1107 (2016).

Assuming that a Department of Health and Human Services' (HHS) contraceptives mandate, that employers provide group health insurance coverage for contraceptives without cost sharing, furthered a compelling governmental interest, the HHS mandate was not the least restrictive means of furthering that interest; the government could simply assume the cost of providing the contraceptives to any women unable to obtain them under their health insurance coverage, or could adopt an approach similar to the accommodation given to nonprofit organizations with religious objections to contraceptives. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 134 S. Ct. 2751, 189 L. Ed. 2d 675 (2014).

2 Employment Div., Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990), overturned due to legislative action, 42 U.S.C.A. ? 2000bb (Nov. 16, 1993); Central Rabbinical Congress of U.S. & Canada v. New York City Dept. of Health & Mental Hygiene, 763 F.3d 183 (2d Cir. 2014); Stormans, Inc. v. Wiesman, 794 F.3d 1064 (9th Cir. 2015); Corder v. Lewis Palmer School Dist. No. 38, 566 F.3d 1219, 244 Ed. Law Rep. 994 (10th Cir. 2009); Gingerich v. Com., 382 S.W.3d 835 (Ky. 2012).

3 Central Rabbinical Congress of U.S. & Canada v. New York City Dept. of Health & Mental Hygiene, 763 F.3d 183 (2d Cir. 2014); Listecki v. Official Committee of Unsecured Creditors, 780 F.3d 731 (7th Cir. 2015); Telescope Media Group v. Lucero, 936 F.3d 740 (8th Cir. 2019); Stormans, Inc. v. Wiesman, 794 F.3d 1064 (9th Cir. 2015).

In determining whether the object of the law is a neutral one requires examining both direct and circumstantial evidence. Listecki v. Official Committee of Unsecured Creditors, 780 F.3d 731 (7th Cir. 2015).

4 North Coast Women's Care Medical Group, Inc. v. Superior Court, 44 Cal. 4th 1145, 81 Cal. Rptr. 3d 708, 189 P.3d 959 (2008).

5 Employment Div., Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990), overturned due to legislative action, 42 U.S.C.A. ? 2000bb (Nov. 16, 1993); Central Rabbinical Congress of U.S. & Canada v. New York City Dept. of Health & Mental Hygiene, 763 F.3d 183 (2d Cir. 2014); Listecki v. Official Committee of Unsecured Creditors, 780 F.3d 731 (7th Cir. 2015); Stormans, Inc. v. Wiesman, 794 F.3d 1064 (9th Cir. 2015); Corder v. Lewis Palmer School Dist. No. 38, 566 F.3d 1219, 244 Ed. Law Rep. 994 (10th Cir. 2009); Phillip v. State, 347 P.3d 128 (Alaska Ct. App. 2015).

6 Stormans, Inc. v. Wiesman, 794 F.3d 1064 (9th Cir. 2015).

7 Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Com'n, 138 S. Ct. 1719, 201 L. Ed. 2d 35 (2018); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993); Central Rabbinical Congress of U.S. & Canada v. New York City Dept. of Health & Mental Hygiene, 763 F.3d 183 (2d Cir. 2014); Jesus Christ Is the Answer Ministries, Inc. v. Baltimore County, Maryland, 915 F.3d 256 (4th Cir. 2019), as amended, (Feb. 25, 2019); New Doe Child #1 v. Congress of United States, 891 F.3d 578 (6th Cir. 2018); Listecki v. Official Committee of Unsecured Creditors, 780 F.3d 731 (7th Cir. 2015); Stormans, Inc. v. Wiesman, 794 F.3d 1064 (9th Cir. 2015).

8 Korte v. Sebelius, 735 F.3d 654 (7th Cir. 2013).

9 Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993); Corder v. Lewis Palmer School Dist. No. 38, 566 F.3d 1219, 244 Ed. Law Rep. 994 (10th Cir. 2009).

10 Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993); Commack Self-Service Kosher Meats, Inc. v. Hooker, 680 F.3d 194 (2d Cir. 2012); Lighthouse Institute for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253 (3d Cir. 2007); New Doe Child #1 v. Congress of United States, 891 F.3d 578 (6th Cir. 2018); Stormans, Inc. v. Wiesman, 794 F.3d 1064 (9th Cir. 2015).

The Colorado Civil Rights Commission did not comply with the Free Exercise Clause requirement of religious neutrality, when it considered whether cake shop owner had violated Colorado's statutory protection against sexual orientation discrimination in places of public accommodation, by refusing to create a cake for a same-sex couple who wanted to celebrate their out-of-state marriage; the Commission's hostility towards religion was reflected in Commissioners' comments at public hearings in the case, as well as the Commission's disparate treatment of the shop owner compared to its treatment of bakers in three other cases who had objected to creating cakes with messages that they had deemed to be discriminatory or derogatory

  

towards same-sex marriage. Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Com'n, 138 S. Ct. 1719, 201 L. Ed. 2d 35 (2018).

11 Listecki v. Official Committee of Unsecured Creditors, 780 F.3d 731 (7th Cir. 2015); Stormans, Inc. v. Wiesman, 794 F.3d 1064 (9th Cir. 2015).

12 Listecki v. Official Committee of Unsecured Creditors, 780 F.3d 731 (7th Cir. 2015).

13 Stormans, Inc. v. Wiesman, 794 F.3d 1064 (9th Cir. 2015).

14 Lighthouse Institute for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253 (3d Cir. 2007).

15 Employment Div., Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990), overturned due to legislative action, 42 U.S.C.A. ? 2000bb (Nov. 16, 1993); Illinois Bible Colleges Association v. Anderson, 870 F.3d 631, 347 Ed. Law Rep. 121 (7th Cir. 2017), as amended, (Oct. 5, 2017) and cert. denied, 138 S. Ct. 1021, 200 L. Ed. 2d 257 (2018).

16 Employment Div., Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990), overturned due to legislative action, 42 U.S.C.A. ? 2000bb (Nov. 16, 1993); Naoko Ohno v. Yuko Yasuma, 723 F.3d 984 (9th Cir. 2013).

Strict scrutiny is the appropriate analysis under the "hybrid rights doctrine," whereby the First Amendment bars application of neutral, generally applicable law to religiously motivated action involving not only the Free Exercise Clause alone but in conjunction with other constitutional protections. Brown v. Buhman, 822 F.3d 1151 (10th Cir. 2016).

The hybrid-rights theory at least requires a colorable showing of infringement of a companion constitutional right. Axson-Flynn v. Johnson, 356 F.3d 1277, 184 Ed. Law Rep. 702 (10th Cir. 2004).

Strict scrutiny may apply when a neutral, generally applicable law incidentally burdens rights protected by the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press, or the rights of parents to direct the education of their children. Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly, 309 F.3d 144 (3d Cir. 2002).

17 Employment Div., Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990), overturned due to legislative action, 42 U.S.C.A. ? 2000bb (Nov. 16, 1993).

18 Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly, 309 F.3d 144 (3d Cir. 2002).

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# 16A Am. Jur. 2d Constitutional Law § 439

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**IX. Fundamental Constitutional Rights and Privileges**

**C. Particular Fundamental Constitutional Rights**

**1. First Amendment Rights Guaranteed by Constitution**

**b. Religious Freedom Guaranteed by Constitution**

**(3) "Free Exercise" of Religion Guaranteed by Constitution and Statute**

## § 439. Tests of governmental regulation of free exercise of religion—Substantial, indirect, or incidental burden

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 1303 to 1308

The Free Exercise Clause prohibits the state from imposing a substantial burden on a central religious belief or practice[1] unless the government establishes a compelling interest in doing so.[2] For purposes of a Free Exercise analysis, a practice or policy places a substantial burden on a person's religious exercise when it puts substantial pressure on an adherent to modify behavior and to violate beliefs.[3] A substantial burden, required to prove a free exercise claim, places more than an inconvenience on religious exercise; it must have a tendency to coerce individuals into acting contrary to their religious beliefs,[4] but a burden is not insubstantial simply because the person could choose to do something else.[5] The burden is impermissible when government action compels individuals to perform acts undeniably at odds with fundamental tenets of their religious beliefs.[6] A policy that expressly discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character imposes a penalty on the free exercise of religion that triggers the most exacting scrutiny.[7] However, in making that determination, the courts must not judge the significance of the particular belief or practice in question.[8]

The Free Exercise Clause protects against indirect coercion or penalties on the free exercise of religion, not just outright prohibitions.[9] The Free Exercise of Religion Clause prohibits the misuse of secular governmental programs to impede the

  

observance of one or all religions or to discriminate invidiously between religions, even though the burden may be characterized as being only indirect.[10] When the state conditions receipt of an important benefit upon conduct proscribed by religious faith or when it denies such a benefit because of conduct mandated by a religious belief, thereby putting substantial pressure on an adherent to modify behavior and violate beliefs, a burden upon religion exists; while the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.[11]

The Supreme Court has generally followed the rule that a law advancing a legitimate governmental interest is not necessarily invalid as one interfering with the "free exercise" of religion merely because it also incidentally has a detrimental effect on the adherents of one or more religions.[12] Incidental burdens on religion are usually not enough to make out a free exercise claim[13] and do not have to be justified by a compelling governmental interest, requiring only a rational basis review.[14] The government does not impermissibly regulate religious belief when it promulgates a neutral, generally applicable law or rule that happens to result in an incidental burden on the free exercise of a particular religious practice or belief.[15]



Footnotes

1 A.A. ex rel. Betenbaugh v. Needville Indep. School Dist., 611 F.3d 248, 258 Ed. Law Rep. 955 (5th Cir. 2010); Kaufman v. Pugh, 733 F.3d 692 (7th Cir. 2013); Fields v. City of Tulsa, 753 F.3d 1000 (10th Cir. 2014).
In the First Amendment context, substantially burdening one's free exercise of religion means that the regulation must significantly inhibit or constrain conduct or expression that manifests some central tenet of a person's individual religious beliefs, must meaningfully curtail a person's ability to express adherence to faith, or must deny a person reasonable opportunity to engage in those activities that are fundamental to a person's religion. U.S. v. Ali, 682 F.3d 705 (8th Cir. 2012).
Free Exercise Clause claims requires showing that plaintiff's right to practice his religion was burdened in a significant way. Kaufman v. McCaughtry, 419 F.3d 678 (7th Cir. 2005).

2 Moussazadeh v. Texas Dept. of Criminal Justice, 703 F.3d 781 (5th Cir. 2012), as corrected, (Feb. 20, 2013).

3 Real Alternatives, Inc. v. Secretary Department of Health and Human Services, 867 F.3d 338 (3d Cir. 2017); Carter v. Fleming, 879 F.3d 132 (4th Cir. 2018).
A person asserting a free exercise claim must show that the government action in question substantially burdens the person's practice of religion. Jones v. Williams, 791 F.3d 1023 (9th Cir. 2015).

4 Jones v. Williams, 791 F.3d 1023 (9th Cir. 2015).

5 A.A. ex rel. Betenbaugh v. Needville Indep. School Dist., 611 F.3d 248, 258 Ed. Law Rep. 955 (5th Cir. 2010).

6 Real Alternatives, Inc. v. Secretary Department of Health and Human Services, 867 F.3d 338 (3d Cir. 2017).

7 Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 198 L. Ed. 2d 551 (2017).

8 Wilcox v. Brown, 877 F.3d 161 (4th Cir. 2017).

9 Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 198 L. Ed. 2d 551 (2017).

10 Gillette v. U.S., 401 U.S. 437, 91 S. Ct. 828, 28 L. Ed. 2d 168 (1971).

11 Thomas v. Review Bd. of Indiana Employment Sec. Division, 450 U.S. 707, 101 S. Ct. 1425, 67 L. Ed. 2d 624 (1981).

12 Gallagher v. Crown Kosher Super Market of Mass., Inc., 366 U.S. 617, 81 S. Ct. 1122, 6 L. Ed. 2d 536 (1961), for additional opinion, see, 366 U.S. 420, 81 S. Ct. 1153, 6 L. Ed. 2d 393 (1961); Braunfeld v. Brown, 366 U.S. 599, 81 S. Ct. 1144, 6 L. Ed. 2d 563 (1961), for additional opinion, see, 366 U.S. 420, 81 S. Ct. 1153, 6 L. Ed. 2d 393 (1961); Alpha Delta Chi-Delta Chapter v. Reed, 648 F.3d 790, 270 Ed. Law Rep. 507 (9th Cir. 2011).

13 Newdow v. Peterson, 753 F.3d 105 (2d Cir. 2014); Bethel World Outreach Ministries v. Montgomery County Council, 706 F.3d 548 (4th Cir. 2013); New Doe Child #1 v. United States, 901 F.3d 1015 (8th Cir. 2018),

cert. denied, 139 S. Ct. 2699, 204 L. Ed. 2d 1092 (2019); American Family Ass'n, Inc. v. F.C.C., 365 F.3d 1156 (D.C. Cir. 2004).

14 § 438.

15 Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993); Employment Div., Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990), overturned due to legislative action, 42 U.S.C.A. ? 2000bb (Nov. 16, 1993); Cornerstone Christian Schools v. University Interscholastic League, 563 F.3d 127, 243 Ed. Law Rep. 609 (5th Cir. 2009).

End of Document

# 16A Am. Jur. 2d Constitutional Law § 440

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**IX. Fundamental Constitutional Rights and Privileges**

**C. Particular Fundamental Constitutional Rights**

**1. First Amendment Rights Guaranteed by Constitution**

**b. Religious Freedom Guaranteed by Constitution**

**(3) "Free Exercise" of Religion Guaranteed by Constitution and Statute**

## § 440. Crime or tort subject to defense of free exercise of religion

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 1303 to 1308, 1414 to 1419

**A.L.R. Library**

Free exercise of religion as defense to prosecution for narcotic or psychedelic drug offense, 35 A.L.R.3d 939
Free exercise of religion clause of First Amendment as defense to tort liability, 93 A.L.R. Fed. 754

The Free Exercise Clause does not include the right to commit crimes or torts in the name of religion. The courts have consistently adhered to the view that where the government has designated certain activities as criminal or tortious, and where its designation is otherwise consistent with the Constitution, then it is no defense to a criminal charge or to a commission of a civil wrong to say that the criminal or tortious act was motivated by religious beliefs.[1] If a religious practice physically injures others, the state has the power to prevent or punish the acts.[2] A wrong practiced in the name of religion is not protected by the Constitution provision for the free exercise and enjoyment of religious profession and worship,[3] and conscientious scruples do not relieve the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs.[4]

  

The punitive power of the government for acts recognized by the general consent of the Christian world in modern times as proper matters for prohibitory legislation cannot be suspended in order that the tenets of a religious sect encouraging crime may be carried out without hindrance.[5]

Specific examples include cases involving polygamy;[6] violation of various provisions of the Military Selective Service Act,[7] such as a refusal to register for the draft[8] or counseling and aiding and abetting another to refuse to register for the military draft;[9] violation of the Federal Food, Drug, and Cosmetic Act;[10] conspiracy to commit murder via terroristic attacks;[11] and narcotic or psychedelic drug offenses.[12]

**Observation:**

Although the states may make a nondiscriminatory religious practice exemption to a drug law, such an exemption is not constitutionally required. Thus, a state may, consistent with the Free Exercise Clause, constitutionally deny claimants unemployment compensation benefits on the ground of misconduct for dismissal from drug counseling positions resulting from their sacramental use of the drug peyote at a ceremony of the Native American church where the ingestion of peyote is illegal under state criminal laws.[13]

The Supreme Court has upheld reversal of convictions of members of the Amish faith for violating a state's compulsory school attendance law requiring children to attend school until the age of 16.[14]

Imposition of a death sentence for a Native American convicted of carjacking resulting in death does not violate the right of free exercise of religion, notwithstanding the Navajo Nation's religious opposition to capital punishment.[15]



Footnotes

1 Wisconsin v. Yoder, 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972); Gillette v. U.S., 401 U.S. 437, 91 S. Ct. 828, 28 L. Ed. 2d 168 (1971); Cleveland v. U.S., 329 U.S. 14, 67 S. Ct. 13, 91 L. Ed. 12 (1946).
The Free Exercise Clause does not shield conduct violating criminal law that protects people and property from physical harm. American Life League, Inc. v. Reno, 47 F.3d 642, 134 A.L.R. Fed. 735 (4th Cir. 1995).

2 Ondrisek v. Hoffman, 698 F.3d 1020 (8th Cir. 2012).

3 Feiner v. New York, 340 U.S. 315, 71 S. Ct. 303, 95 L. Ed. 295 (1951).

4 Braunfeld v. Brown, 366 U.S. 599, 81 S. Ct. 1144, 6 L. Ed. 2d 563 (1961), for additional opinion, see, 366 U.S. 420, 81 S. Ct. 1153, 6 L. Ed. 2d 393 (1961).

5 Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. U.S., 136 U.S. 1, 10 S. Ct. 792, 34 L. Ed. 478 (1890).

6 § 450.

7 U.S. v. Kime, 188 F.2d 677 (7th Cir. 1951).

8 U.S. v. Bertram, 477 F.2d 1329 (10th Cir. 1973).

9 Gara v. U.S., 340 U.S. 857, 71 S. Ct. 87, 95 L. Ed. 628 (1950) (abrogated on other grounds by, Toussie v. U.S., 397 U.S. 112, 90 S. Ct. 858, 25 L. Ed. 2d 156 (1970)).

10 Church of Scientology of Cal. v. Richardson, 437 F.2d 214 (9th Cir. 1971).

11 Brazauskas v. Fort Wayne-South Bend Diocese, Inc., 796 N.E.2d 286, 181 Ed. Law Rep. 786 (Ind. 2003).

12 U.S. v. Spears, 443 F.2d 895 (5th Cir. 1971); Olsen v. Mukasey, 541 F.3d 827 (8th Cir. 2008); People v. Rubin, 168 Cal. App. 4th 1144, 86 Cal. Rptr. 3d 170 (2d Dist. 2008); Nesbeth v. U.S., 870 A.2d 1193 (D.C. 2005); State v. Adler, 108 Haw. 169, 118 P.3d 652 (2005); Trujillo v. State, 2 P.3d 567 (Wyo. 2000).

13 Employment Div., Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990), overturned due to legislative action, 42 U.S.C.A. ? 2000bb (Nov. 16, 1993).

14 Wisconsin v. Yoder, 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972).

15 U.S. v. Mitchell, 502 F.3d 931 (9th Cir. 2007).

End of Document

**16A Am. Jur. 2d Constitutional Law § 441**

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# § 441. Aid to religious organizations subject to Religion Clauses of Constitution

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 1310, 1312, 1328 to 1340(4)

The Establishment Clause of the First Amendment prohibits by its terms taxing and spending in aid of religion,[1] but religious institutions are not disabled by the Establishment Clause from participating in publicly sponsored social welfare programs.[2] The Establishment Clause does not bar every kind of government aid to all religious organizations; the question is whether the government provides the same benefit to all similarly situated entities on the same terms.[3] In determining whether direct aid to an organization violates the Establishment Clause, the Court must ask whether the government acted with the purpose of advancing or inhibiting religion, and whether the aid has the effect of advancing or inhibiting religion.[4] Government aid to a religious organization will fail the primary effect test for an Establishment Clause violation if the aid (1) results in government indoctrination, (2) defines the recipients of the aid by reference to religion, or (3) creates excessive government entanglement with religion.[5]

There are two ways to achieve neutrality in providing state aid that does not violate the Establishment Clause (1) when the aid flows to religious organizations only because of a private, independent choice made by a third party; or (2) when the aid to the religious organization is an incidental part of a larger and neutral program.[6] The link between government funds and religious training is broken by the independent and private choice of recipients.[7] If numerous private choices, rather than the single choice of a government, determine the distribution of aid to faith-based organizations pursuant to neutral eligibility criteria, then a

  

government cannot, or at least cannot easily, grant special favors that might lead to a religious establishment in violation of the Establishment Clause.[8] A state law authorizing funding for infrastructure improvements and other projects, which included grants to churches and parochial schools, did not facially violate the Establishment Clause, since the purpose of the law and its several provisions was to fund capital improvements and construction, and to create jobs in the state—a legitimate, secular legislative purpose—the law did not have the primary effect either of advancing or inhibiting religion, and there was no showing that the law's provisions fostered excessive entanglement between church and state.[9]

A law providing for grants to both religious and secular organizations that provide secular services to the public (such as counseling on teenage sexuality) is not unconstitutional where potential grantees are required to disclose exactly what services they intend to provide and how they will be provided because a mechanism is thereby created whereby the government can police grants to ensure that federal funds are not being used for impermissible purposes.[10]

The state's denial of the application by a church, which operated a preschool and daycare center, for a grant to purchase rubber playground surfaces, based on a department policy of denying grants to religiously affiliated applicants, was a denial of the church's free exercise rights, since the state's policy preference for avoiding religious establishment concerns was not a compelling interest.[11]

When the government directs that a subsidy be given exclusively to religious organizations which is not required by the Free Exercise Clause and which either burdens nonbeneficiaries markedly or cannot reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion, it provides an unjustifiable award of assistance to a religious organization.[12]

The First Amendment does not preclude a state from extending assistance under a state vocational rehabilitation assistance program to a blind person who happens to have chosen to study at a Christian college to become a pastor, missionary, or youth director.[13]



Footnotes

1 Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 92 S. Ct. 1965, 32 L. Ed. 2d 627 (1972).

2 Bowen v. Kendrick, 487 U.S. 589, 108 S. Ct. 2562, 101 L. Ed. 2d 520 (1988).

3 Ark Encounter, LLC v. Parkinson, 152 F. Supp. 3d 880 (E.D. Ky. 2016).
A city development authority's downtown revitalization program, under which reimbursement grants funded by property tax revenues were allocated to downtown property owners who made approved renovations to exteriors of their buildings, was neutral toward religion, as required by the Establishment Clause, although grants were disbursed to several churches; the program made grants available to wide spectrum of religious and secular owners, and employed neutral criteria to determine eligibility. American Atheists, Inc. v. City Of Detroit Downtown Development Authority, 567 F.3d 278 (6th Cir. 2009).
The provision of money or property to religious exercise is indirect, and therefore constitutional under a state constitution's religious liberty clause, if the money or property is provided on a nondiscriminatory basis and is equally accessible to all. Summum v. Pleasant Grove City, 2015 UT 31, 345 P.3d 1188 (Utah 2015).

4 Americans United for Separation of Church and State v. Prison Fellowship Ministries, Inc., 509 F.3d 406 (8th Cir. 2007).

5 Community House, Inc. v. City of Boise, Idaho, 623 F.3d 945 (9th Cir. 2010).

6 Wirtz v. City of South Bend, In., 813 F. Supp. 2d 1051, 276 Ed. Law Rep. 718 (N.D. Ind. 2011).

7 Locke v. Davey, 540 U.S. 712, 124 S. Ct. 1307, 158 L. Ed. 2d 1, 185 Ed. Law Rep. 30 (2004).
When public funding flows to faith-based organizations solely as a result of the genuinely independent and private choices of individuals, the funding is considered indirect, on an Establishment Clause claim.

Freedom From Religion Foundation, Inc. v. McCallum, 214 F. Supp. 2d 905 (W.D. Wis. 2002), judgment aff'd, 324 F.3d 880 (7th Cir. 2003).

8 Teen Ranch, Inc. v. Udow, 479 F.3d 403, 2007 FED App. 0062P (6th Cir. 2007).

9 Sherman v. Quinn, 735 F. Supp. 2d 1035 (C.D. Ill. 2010).

10 Bowen v. Kendrick, 487 U.S. 589, 108 S. Ct. 2562, 101 L. Ed. 2d 520 (1988).

11 Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 198 L. Ed. 2d 551 (2017).

12 Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 109 S. Ct. 890, 103 L. Ed. 2d 1 (1989).

13 Witters v. Washington Dept. of Services for the Blind, 474 U.S. 481, 106 S. Ct. 748, 88 L. Ed. 2d 846, 29 Ed. Law Rep. 496 (1986).

**End of Document**

# 16A Am. Jur. 2d Constitutional Law § 442

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**IX. Fundamental Constitutional Rights and Privileges**

**C. Particular Fundamental Constitutional Rights**

**1. First Amendment Rights Guaranteed by Constitution**

**b. Religious Freedom Guaranteed by Constitution**

**(4) Particular Applications of Religious Freedom under Constitution**

## § 442. Aid to medical or charitable institutions subject to Religion Clauses of Constitution

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 1395 to 1399

Financial aid provided by the government to hospitals for the treatment and cure of impoverished patients does not violate the Establishment Clause of the First Amendment simply because the hospital happens to be operated by a religious organization, so long as the hospitals serve all regardless of creed and there is no effort made to advance the particular religion.[1] Similarly, the lease of a city-county hospital to a religious organization for operation is not unconstitutional.[2] A state statute that gave tax-exempt status to bonds that would be used to facilitate the building of hospitals did not contravene the First Amendment merely because some of the hospitals that would be so engaged in the statutory scheme had religious affiliations.[3]

An establishment of religion was not effected by amendments to Medicare and Medicaid delegating to covered "religious nonmedical health care institutions" the power to determine when to admit and discharge persons, without medical exam and without standards to guide their exercise of that power, since the exercise of the delegated power facilitated the payment of funds for physical services that were in themselves neither religious nor teaching a religion, and the requirement of medical exam or diagnosis as condition for benefits would defeat the purpose of the amendments.[4]

If a client of private alcoholic treatment facility which receives state funding attends Alcoholics Anonymous (A.A.) sessions offered as part of the facility's program, which constitute "religion" for purposes of the First Amendment, as a matter of the client's own personal choice, the client has not been coerced into a form of worship or prayer, and Establishment Clause is

  

not violated.[5] Offenders participated in a faith-based drug and alcohol treatment program as result of the offenders' private, independent choice, defeating a claim that the state's funding of the program violated the Establishment Clause; the offenders were informed they could not be ordered to participate in a religious program, a secular alternative was required to be offered under state policy, and no evidence showed that the offenders who rejected a particular program were punished, although the faith-based program lasted months longer than the secular programs which were offered, and the offenders' choice was restricted to preapproved providers.[6]

The Adolescent Family Life Act did not have the "primary effect of advancing religion," though the Act provided for grants to religious and other organizations providing counseling on teenage sexuality without expressly requiring that funds not be used for religious purpose; the Act required potential grantees to disclose exactly what services they intended to provide and how they would be provided, thereby creating mechanism whereby government could police grants to ensure that federal funds were not used for impermissible purposes.[7]

The Hyde Amendment, which severely limits use of federal funds to reimburse the cost of abortions under the Medicaid program, does not run afoul of the Establishment Clause, notwithstanding that its funding restrictions may coincide with the religious tenets of the Roman Catholic Church.[8]

A township trustee's practice of providing emergency shelter to the homeless poor by reimbursing private religious mission shelters, which required attendance at religious service as a condition of being given shelter, violated the Free Exercise and Establishment Clauses of the United States and Indiana Constitutions, notwithstanding the trustee's claim that there was no "state action" because the missions rather than the trustee imposed the religious service requirement.[9]



Footnotes

1 Bowen v. Kendrick, 487 U.S. 589, 108 S. Ct. 2562, 101 L. Ed. 2d 520 (1988).

2 Abernathy v. City of Irvine, 355 S.W.2d 159 (Ky. 1961).

3 Fort Sanders Presbyterian Hospital v. Health and Educational Facilities Bd. of Knox County, 224 Tenn. 240, 453 S.W.2d 771 (1970).

4 Kong v. Scully, 341 F.3d 1132 (9th Cir. 2003), opinion amended on other grounds on denial of reh'g, 357 F.3d 895 (9th Cir. 2004).

5 DeStefano v. Emergency Housing Group, Inc., 247 F.3d 397 (2d Cir. 2001).

6 Freedom From Religion Foundation, Inc. v. McCallum, 214 F. Supp. 2d 905 (W.D. Wis. 2002), judgment aff'd, 324 F.3d 880 (7th Cir. 2003).

7 Bowen v. Kendrick, 487 U.S. 589, 108 S. Ct. 2562, 101 L. Ed. 2d 520 (1988).

8 Harris v. McRae, 448 U.S. 297, 100 S. Ct. 2671, 65 L. Ed. 2d 784 (1980).

9 Center Tp. of Marion County v. Coe, 572 N.E.2d 1350 (Ind. Ct. App. 1991).

**16A Am. Jur. 2d Constitutional Law § 443**

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**IX. Fundamental Constitutional Rights and Privileges**

**C. Particular Fundamental Constitutional Rights**

**1. First Amendment Rights Guaranteed by Constitution**

**b. Religious Freedom Guaranteed by Constitution**

**(4) Particular Applications of Religious Freedom under Constitution**

# § 443. Education and school services and facilities subject to Religion Clauses of Constitution

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 1342 to 1372

**A.L.R. Library**

Validity and construction of school choice programs—post-Lemon v. Kurtzman, 78 A.L.R.5th 133
Validity, Construction, and Application of Equal Access Act (20 U.S.C.A. ss 4071-4074), 174 A.L.R. Fed. 407

In the area of education, the courts have had to consider whether the Establishment Clause has been violated by various forms of public aid to church-related schools[1] and general state aid to religiously affiliated private colleges and institutions.[2] The general rule is that government programs made available to a broad class of citizens defined in a religion neutral fashion may be used by individuals receiving them in a religious setting, and a program making such benefits available does not thereby violate the Establishment Clause.[3] For purposes of the Establishment Clause, the link between government funds and religious training is broken by the independent and private choice of recipients.[4] Where a government aid program is neutral with respect to religion and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools

  

wholly as result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause.[5] If aid to schools, even "direct aid," is neutrally available and, before reaching or benefiting any religious school, first passes through the hands, literally or figuratively, of numerous private citizens who are free to direct the aid elsewhere, the government has not provided any "support of religion" for Establishment Clause purposes.[6] A state did not violate the Free Exercise Clause by denying a scholarship to student pursuing a devotional theology degree at a private college, pursuant to a state statute prohibiting state aid to any postsecondary student pursuing a degree in theology, and higher education coordinating the board's implementing policy; the state's refusal to fund theological instruction, although it funded training for secular professions, was not presumptively unconstitutional since the state's interest in not funding theological instruction was not based on hostility toward religion but rather was to avoid establishment of religion, and it placed a relatively minor burden on students.[7] However, exclusion of pervasively sectarian institutions from state scholarship programs violated the First and 14th Amendments because the programs impermissibly discriminated among religions, the criteria for determining program eligibility involved unconstitutionally intrusive scrutiny of religious belief and practice, and the state did not have the historic and substantial interest to justify the discriminatory nature of the exclusion.[8]

The Religion Clauses of the First Amendment do not impose a prohibition on all religious activity in public schools, but school sponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are not adherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.[9]

The Supreme Court has not extended its Establishment Clause jurisprudence to foreclose private religious conduct during nonschool hours merely because it takes place on school premises where elementary school children may be present,[10] but religious coercion concerns under the Establishment Clause are heightened when the conduct at issue involves elementary and secondary public school students, given that, in applying the endorsement test for determining whether a violation of the First Amendment's Establishment Clause has occurred, looking for state action that communicates a government's endorsement of a religion or a particular religious belief, endorsement is especially concerning when impressionable children are involved.[11]

Other First Amendment topics or problems in the education or school context concern courses of instruction, curricula, books;[12] prayers, Bible reading, or the distribution of religious literature;[13] teachers' classroom discussions of their personal religious beliefs;[14] a statute requiring the posting of the 10 Commandments in public school classrooms;[15] the selection of school mascots;[16] the use of school buildings and property;[17] including religious structures or symbols on school property;[18] compulsory school attendance laws;[19] requirement of the flag salute and pledge of allegiance;[20] and compulsory vaccination or immunization regulations.[21]

Articles attacking religion which were published in college newspapers partially supported by public funds were not in violation of the Establishment Clause of the First Amendment where publication of the articles was not systematic and was not done with the intent to break down religious beliefs or to exclude discussion of the other side of the issues raised.[22]



Footnotes

1 Am. Jur. 2d, Schools §§ 449 to 464.

2 Roemer v. Board of Public Works of Maryland, 426 U.S. 736, 96 S. Ct. 2337, 49 L. Ed. 2d 179 (1976).

3 Agostini v. Felton, 521 U.S. 203, 117 S. Ct. 1997, 138 L. Ed. 2d 391, 119 Ed. Law Rep. 29, 37 Fed. R. Serv. 3d 1051 (1997).

4 Locke v. Davey, 540 U.S. 712, 124 S. Ct. 1307, 158 L. Ed. 2d 1, 185 Ed. Law Rep. 30 (2004).

5 Zelman v. Simmons-Harris, 536 U.S. 639, 122 S. Ct. 2460, 153 L. Ed. 2d 604, 166 Ed. Law Rep. 30 (2002).

6 Mitchell v. Helms, 530 U.S. 793, 120 S. Ct. 2530, 147 L. Ed. 2d 660, 145 Ed. Law Rep. 44 (2000).

7 Locke v. Davey, 540 U.S. 712, 124 S. Ct. 1307, 158 L. Ed. 2d 1, 185 Ed. Law Rep. 30 (2004).

8 Colorado Christian University v. Weaver, 534 F.3d 1245, 235 Ed. Law Rep. 68 (10th Cir. 2008).

9 Santa Fe Independent School Dist. v. Doe, 530 U.S. 290, 120 S. Ct. 2266, 147 L. Ed. 2d 295, 145 Ed. Law Rep. 21 (2000).

10 Good News Club v. Milford Central School, 533 U.S. 98, 121 S. Ct. 2093, 150 L. Ed. 2d 151, 154 Ed. Law Rep. 45 (2001).

11 Freedom From Religion Foundation, Inc. v. Concord Community Schools, 885 F.3d 1038, 352 Ed. Law Rep. 987 (7th Cir. 2018).

12 Am. Jur. 2d, Schools §§ 441 to 445.

13 Am. Jur. 2d, Schools §§ 436 to 440.

14 Helland v. South Bend Community School Corp., 93 F.3d 327, 111 Ed. Law Rep. 1108 (7th Cir. 1996).

15 Stone v. Graham, 449 U.S. 39, 101 S. Ct. 192, 66 L. Ed. 2d 199 (1980).

16 Kunselman v. Western Reserve Local School Dist., 70 F.3d 931, 105 Ed. Law Rep. 43, 1995 FED App. 0358P (6th Cir. 1995).

17 Am. Jur. 2d, Schools §§ 446 to 448.

18 Am. Jur. 2d, Schools §§ 432 to 434.

19 Am. Jur. 2d, Schools § 266.

20 Am. Jur. 2d, Schools § 288.

21 Am. Jur. 2d, Schools § 345.

22 Panarella v. Birenbaum, 32 N.Y.2d 108, 343 N.Y.S.2d 333, 296 N.E.2d 238 (1973).

**End of Document**

# 16A Am. Jur. 2d Constitutional Law § 444

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**IX. Fundamental Constitutional Rights and Privileges**

**C. Particular Fundamental Constitutional Rights**

**1. First Amendment Rights Guaranteed by Constitution**

**b. Religious Freedom Guaranteed by Constitution**

**(4) Particular Applications of Religious Freedom under Constitution**

## § 444. Use of government property subject to Religion Clauses of Constitution

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 1374 to 1382

The government need not permit all forms of speech on property that it owns and controls.[1] Compliance with the First Amendment's Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on religious speech on public property.[2] Whether laws or regulations inhibiting the totally free and unrestrained exercise of religion in public places are constitutional depends in large part on whether the restraints that have been imposed constitute legitimate exercises of the police powers of the states or municipalities.[3]

When the courts have concluded that the restraints were valid, nondiscriminatory rules established for the general welfare, they have found no violation of the constitutional right to the free exercise of religion,[4] but when they have concluded that the restraints themselves were arbitrary or were exercised in an arbitrary manner, such regulations are violative of the First Amendment.[5]

Under the "forum-based" approach for assessing restrictions that the government seeks to place on the use of its own property, the regulation of speech on government property that has traditionally been available for public expression is subject to the highest scrutiny; such regulations survive only if they are narrowly drawn to achieve a compelling state interest.[6] When a public or government agency creates a forum generally open to the public but denies access to those who would engage in

  

protected religious speech, the state's interest in avoiding an Establishment Clause violation is not a defense to violating the Free Exercise Clause rights of religious speakers.[7] In the public forum setting of a city festival celebrating Arab culture, Christian evangelists' proselytizing constituted religious conduct that was protected by Free Exercise Clause.[8] When a state university made its facilities generally available for the activities of registered student groups, its closing of the facilities to a registered student group desiring to use the facilities for religious worship and discussion violated the fundamental principle that a state regulation of speech should be content neutral.[9]

In Establishment Clause jurisprudence in a public forum context, the distinction between private speech and government speech is crucial, as the Establishment Clause forbids government speech endorsing religion and thus when government speaks for itself it must carefully avoid expressing favoritism for particular religious viewpoint; however, when the government merely sponsors private speech, by providing citizens with equal access to a public forum such as public park, Establishment Clause concerns wane.[10] For this purpose, three key qualities characterize an "open public forum," i.e., a forum in which government-sponsored speech is appropriately considered private speech and is, therefore, not regulated by the Establishment Clause; the open public forum must be (1) accessible to a variety of speakers, (2) on a broad range of topics, (3) regardless of the speakers' messages.[11]

A regulation limiting expressive activity conducted on property that is not traditionally available for public expression or is not designated as a public forum need only be reasonable, as long as the regulation is not an effort to suppress the speaker's activity because of a disagreement with the speaker's view.[12] Sincerely held religious beliefs are not impermissibly burdened in violation of the Free Exercise Clause by restrictions on evangelizing in a nonpublic forum where a multitude of means remains for the same evangelization.[13] When a limited public forum is available for use by groups presenting any viewpoint, the Supreme Court will not find an Establishment Clause violation simply because only groups presenting a religious viewpoint have opted to take advantage of the forum at a particular time.[14]



Footnotes

1 International Soc. for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 112 S. Ct. 2701, 120 L. Ed. 2d 541 (1992).

2 Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 115 S. Ct. 2440, 132 L. Ed. 2d 650 (1995).

3 § 397.

4 Poulos v. State of N.H., 345 U.S. 395, 73 S. Ct. 760, 97 L. Ed. 1105, 30 A.L.R.2d 987 (1953); Cox v. State of New Hampshire, 312 U.S. 569, 61 S. Ct. 762, 85 L. Ed. 1049, 133 A.L.R. 1396 (1941).

5 Fowler v. State of R.I., 345 U.S. 67, 73 S. Ct. 526, 97 L. Ed. 828 (1953); Kunz v. People of State of New York, 340 U.S. 290, 71 S. Ct. 312, 95 L. Ed. 280 (1951); Niemotko v. State of Md., 340 U.S. 268, 71 S. Ct. 325, 95 L. Ed. 267 (1951).

6 Widmar v. Vincent, 454 U.S. 263, 102 S. Ct. 269, 70 L. Ed. 2d 440, 1 Ed. Law Rep. 13 (1981); Doe v. South Iron R-1 School Dist., 498 F.3d 878, 224 Ed. Law Rep. 48 (8th Cir. 2007).
A resolution of the board of airport commissioners banning all "First Amendment activities" within the "Central Terminal Area" at the Los Angeles International Airport was facially unconstitutional under the First Amendment overbreadth doctrine, regardless of whether the airport was considered a nonpublic forum, because no conceivable governmental interest could justify such an absolute prohibition of speech. Board of Airport Com'rs of City of Los Angeles v. Jews for Jesus, Inc., 482 U.S. 569, 107 S. Ct. 2568, 96 L. Ed. 2d 500 (1987).

7 Doe v. South Iron R-1 School Dist., 498 F.3d 878, 224 Ed. Law Rep. 48 (8th Cir. 2007).

8 Bible Believers v. Wayne County, Mich., 805 F.3d 228 (6th Cir. 2015).

9 Widmar v. Vincent, 454 U.S. 263, 102 S. Ct. 269, 70 L. Ed. 2d 440, 1 Ed. Law Rep. 13 (1981).

10 Felix v. City of Bloomfield, 36 F. Supp. 3d 1233 (D.N.M. 2014), aff'd, 841 F.3d 848 (10th Cir. 2016).

11 Felix v. City of Bloomfield, 36 F. Supp. 3d 1233 (D.N.M. 2014), aff'd, 841 F.3d 848 (10th Cir. 2016).

12 International Soc. for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 112 S. Ct. 2701, 120 L. Ed. 2d 541 (1992).
A former public street that was purchased by a church and developed into a plaza was not a public forum, and thus speech restrictions on the plaza did not violate the First Amendment; signs posted at all entrances to the plaza and its differentiation from the surrounding sidewalks, the objective, physical characteristics demonstrated that the plaza was privately owned, further, although a prior easement that was purchased from the city by the church required the government to allow expressive activity, the plaza was no longer owned or controlled by the government. Also, the city's sale of the plaza easement to the church did not violate the purpose prong of the test used to determine whether there was a violation of the Establishment Clause. Utah Gospel Mission v. Salt Lake City Corp., 425 F.3d 1249 (10th Cir. 2005).

13 Archdiocese of Washington v. Washington Metropolitan Area Transit Authority, 897 F.3d 314 (D.C. Cir. 2018).

14 Good News Club v. Milford Central School, 533 U.S. 98, 121 S. Ct. 2093, 150 L. Ed. 2d 151, 154 Ed. Law Rep. 45 (2001).

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# 16A Am. Jur. 2d Constitutional Law § 445

**American Jurisprudence, Second Edition** | May 2021 Update

**Constitutional Law**

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**IX. Fundamental Constitutional Rights and Privileges**

**C. Particular Fundamental Constitutional Rights**

**1. First Amendment Rights Guaranteed by Constitution**

**b. Religious Freedom Guaranteed by Constitution**

**(4) Particular Applications of Religious Freedom under Constitution**

## § 445. Use of government property subject to Religion Clauses of Constitution—Religious texts, structures, or symbols

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 1376 to 1381

**A.L.R. Library**

State Constitutional Challenges to the Display of Religious Symbols on Public Property, 26 A.L.R.6th 145

First Amendment Challenges to Display of Religious Symbols on Public Property, 107 A.L.R.5th 1

**Trial Strategy**

Cause of Action to Prevent the Display of Religious Symbols on Public Property, 25 Causes of Action 2d 221

  

**Forms**

Forms relating to religion and public property, see Am. Jur. Pleading and Practice Forms, Religious Societies [Westlaw®(r) Search Query]

In considering whether the erection, maintenance, or display of religious structures or symbols on public property constitutes a violation of religious freedom within the strictures of the Establishment Clause, a governmental purpose to advance or inhibit religion generally or any sect particularly through the erection, maintenance, or display of religious structures or symbols on public property constitutes a violation of religious freedom.[1] However, a government entity's choice to place a display that includes religious symbols on public, rather than private, property does not doom the display under the Establishment Clause.[2] The test for reviewing the constitutionality of religious displays on government property is that a government regulation must (1) have a secular legislative purpose, (2) the principal or primary effect must be one that neither advances nor inhibits religion, and (3) the regulation must not foster an excessive government entanglement with religion.[3]

Retaining established, religiously expressive monuments, symbols, and practices is quite different from erecting or adopting new ones, and so the passage of time gives rise to a strong presumption of constitutionality under the Establishment Clause.[4] Where categories of monuments, symbols, and practices with a longstanding history follow in the tradition of the First Congress, in demonstrating respect and tolerance for differing views, engaging in an honest endeavor to achieve inclusivity and nondiscrimination, and recognizing the important role that religion plays in the lives of many Americans, they are likewise constitutional under the Establishment Clause.[5] In addition, when a display includes many other monuments or symbols, the undeniably religious symbolism of one monument may take on a dual significance, partaking of both religion and government; in this context, courts are not to focus solely on the religious component in challenged government displays, but should consider the overall message conveyed and the broader context in which the display appears.[6] Religious symbols within a government display can become embedded features of a community's landscape and identity, valued for more than just their religious roots, for purposes of the Establishment Clause; familiarity itself can become a reason for preservation of a religious symbol in a government display.[7]

In determining whether monument offends Establishment Clause because objective observer would conclude that it has the purpose of advancing religious message, the entire history surrounding the monument is relevant; the original religious purpose may not be concealed by later acts, nor may a newfound religious purpose be shielded by reference to the original purpose.[8] A court reviewing a First Amendment Establishment Clause challenge to a particular holiday display considers whether a reasonable observer, aware of the history and context of the community and forum in which the religious display appears, would understand it to endorse religion or one religion over another.[9] The objective or reasonable observer employed in applying the effect prong Establishment Clause endorsement test is kin to the fictitious reasonably prudent person of tort law, so the court of appeals presumes that the court-created objective observer is aware of information not limited to the information gleaned simply from viewing the challenged display.[10]

When a religious object is displayed in the main part of an important government building—such as a display of the Ten Commandments—no viewer could reasonably think that it occupies that location without the support and approval of the government, thus supporting an Establishment Clause challenge.[11] However, in cases dealing with display of the Ten

  

Commandments on public property, the courts can look at the historical significance of the Ten Commandments and the history of official acknowledgment by all three branches of government dating back to 1789 of role of religion in American life.[12] Given those considerations, the Establishment Clause was not violated by display of monument inscribed with the Ten Commandments on the grounds of the Texas State Capitol, since Texas had treated the capitol grounds monuments as representing several strands in the state's political and legal history and inclusion of the Ten Commandments monument in that group had a dual significance, partaking of both religion and government.[13] A nine-piece historical document display at a county courthouse, which included the Ten Commandments, endorsed an educational message rather than a religious one, as viewed by an objective standard under the effects test, and thus did not violate the Establishment Clause, since all nine documents in the display were of equal size, the display was placed in a low-traffic area of the courthouse on second floor which did not suggest prayer, meditation or other religious activity, and an explanatory document outlined historical significance of each piece in display.[14]

A 32-foot tall Latin cross sitting on a tall pedestal on public land, erected as a memorial to area soldiers who died serving in World War I, did not violate the Establishment Clause; although the cross was undoubtedly a Christian symbol, it had taken on an added secular meaning as a symbol of the sacrifice of American soldiers killed in the war, it also had acquired additional layers of historical meaning in subsequent years, as it now stood among memorials to veterans of later wars, there was no evidence of discriminatory intent in the selection of the design of the memorial or the decision of state agency to maintain it, and its removal or radical alteration would be seen by many not as a neutral act but as the manifestation of a hostility toward religion.[15] The city symbol of Las Cruces, New Mexico, incorporating three Christian crosses, with the middle cross standing taller, did not have the effect of endorsing Christianity, so as to violate the Establishment Clause, where the city's name translated as "The Crosses," the name derived from the city's founding near a makeshift cemetery, and multiple crosses were used widely throughout the community to signify the connection to the city.[16] However, the Court can take the evolution of the display into account and find a violation if the purpose was to emphasize and celebrate the commandments' religious message.[17]

A city's display of a menorah on a public sidewalk in front of private property did not amount to an endorsement of religion in violation of the Establishment Clause; while the menorah was of considerable height, it was set against a neutralizing secular background of a commercial and privately owned building, and in the immediate vicinity of the menorah were decorations typifying the secular celebration of Christmas, and a display of the Muslim faith in the form of a star and crescent.[18] A display of an unlit "Katowitz Menorah" in the rotunda of a City Hall during Hanukah season did not violate the Establishment Clause, when the Menorah was displayed with a Christmas tree and had historical significance because it was saved from destruction during the Nazi Holocaust; the rotunda was continually used to exhibit artistic, cultural, and historic displays.[19]

**Practice Tip:**

In evaluating an Establishment Clause challenge to a permanent monument displayed on government property, curative actions can be considered in determining whether the permanent monument has lost its initial religious effect due to subsequent events surrounding and impacting that monument; it is possible that a government may begin with an impermissible purpose, or create an unconstitutional effect, but later take affirmative actions to neutralize the endorsement message so that adherence to a religion is not relevant in any way to a person's standing in the political community.[20] For a government's curative measure to be sufficient to negate its initial religious endorsement of religion by a display on government property, it should be purposeful enough for an objective observer to know, unequivocally, that the government does not endorse religion, it should be public enough so that people need not burrow into a difficult-to-access legislative record for evidence to assure themselves that the government is not endorsing a religious view, and it should be persuasive enough to countermand the preexisting message of religious endorsement.[21] However, a City's refusal to add a secular message board declaring that "religion is but myth and superstition" to a winter holiday display in the atrium of the City's civic center that included a "Winter Welcome" sign, reindeer, and a mailbox for Santa, as well as a nativity

  

scene was not a lack of neutrality on the city's part in favor of religion or any one religion that would violate the Establishment Clause, since all of the objects in the display, except the nativity scene, were nonreligious.[22]

In the determination of various questions essential to a decision on the propriety of the erection, maintenance, or display of religious symbols on public property, the temporariness of the display is not a factor militating in favor of its legality.[23]

A borough's selective, discretionary application of an ordinance barring private citizens from affixing signs and other items to utility poles triggered strict scrutiny of a claim that an order requiring removal of religiously significant items, or lechis, that were attached to utility poles on borough property by Orthodox Jewish residents for purposes of creating eruv, a ceremonial demarcation of area that allowed disabled and other residents to attend synagogue on the Sabbath, violated the Free Exercise Clause of First Amendment.[24]

Support for homosexuality or for gay rights is not a religion that supports an action alleging that the display of a rainbow colored flag in federal buildings violates the Establishment Clause as a religious display.[25]



Footnotes

1 School Dist. of Abington Tp., Pa. v. Schempp, 374 U.S. 203, 83 S. Ct. 1560, 10 L. Ed. 2d 844 (1963).
The government's bad guess, or bad legal advice, about the constitutional implications of an application for a permit to display a Nativity scene on a county road median, without more, did not show a purpose to favor or disfavor religion in violation of the Establishment Clause. Satawa v. Macomb County Road Com'n, 689 F.3d 506 (6th Cir. 2012).
The relevant question under a state constitution's religious liberty clause's prohibition against the use of public money or property for religious purposes is whether a monument constitutes religious worship, exercise or instruction. Summum v. Pleasant Grove City, 2015 UT 31, 345 P.3d 1188 (Utah 2015).

2 Freedom from Religion Foundation, Inc. v. City of Warren, Mich., 707 F.3d 686 (6th Cir. 2013).

3 American Legion v. American Humanist Association, 139 S. Ct. 2067, 204 L. Ed. 2d 452 (2019) (citing Lemon v. Kurtzman, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971)).
For a general discussion of the Establishment Clause test, see § 429.

4 American Legion v. American Humanist Association, 139 S. Ct. 2067, 204 L. Ed. 2d 452 (2019).
Plaintiffs failed to overcome presumption that the city's maintenance of a cross in the city park did not violate the Establishment Clause, even though it was not originally established as a war memorial, where there was no evidence of discriminatory intent or deliberate disrespect in the monument's design, and it was used as war memorial over years. Kondrat'yev v. City of Pensacola, 949 F.3d 1319 (11th Cir. 2020).
The presumption of constitutionality under the Establishment Clause may control even where there is direct evidence of religious motivation by some officials involved in adopting, designing, and dedicating the religious symbol in a government display. Freedom From Religion Foundation, Inc. v. County of Lehigh, 933 F.3d 275 (3d Cir. 2019).

5 American Legion v. American Humanist Association, 139 S. Ct. 2067, 204 L. Ed. 2d 452 (2019).

6 Freedom From Religion Foundation, Inc. v. County of Lehigh, 933 F.3d 275 (3d Cir. 2019).
A municipality's annual Christmas holiday display, which was located in public park and included creche or nativity scene with figures representing baby Jesus, Mary, and Joseph, three large evergreen trees decorated with colored lights, and sign saluting liberty and extending holiday wishes from village board, did not violate

First Amendment Establishment Clause. King v. Village of Waunakee, 185 Wis. 2d 25, 517 N.W.2d 671 (1994).

7 Freedom From Religion Foundation, Inc. v. County of Lehigh, 933 F.3d 275 (3d Cir. 2019).

8 Staley v. Harris County, Tex., 461 F.3d 504 (5th Cir. 2006), on reh'g en banc, 485 F.3d 305 (5th Cir. 2007).

9 Skoros v. City of New York, 437 F.3d 1, 206 Ed. Law Rep. 525 (2d Cir. 2006).

10 Weinbaum v. City of Las Cruces, N.M., 541 F.3d 1017, 236 Ed. Law Rep. 575 (10th Cir. 2008).

11 Felix v. City of Bloomfield, 841 F.3d 848 (10th Cir. 2016), holding that the City's conduct in authorizing continued display of the Ten Commandments monument on the lawn in front of municipal building complex had the primary or principal effect of endorsing religion, as the text was unmistakably religious, the monument was located directly in front of the principal municipal building, and was clearly visible to onlookers or persons driving by on roadway, funding for monument was initially sought exclusively through local churches, and the dedication of the monument began with invocation by deacon of local church and contained religious references.

12 Van Orden v. Perry, 545 U.S. 677, 125 S. Ct. 2854, 162 L. Ed. 2d 607 (2005).
A Ten Commandments monument placed on City-owned land did not violate the Establishment Clause, where the monument was a passive display, it had not been physically altered, it had been in place undisturbed for many years, and the Board of City Commissioners, in adopting ordinance mandating that the monument could not be removed and adopting a policy of not accepting additional monuments on the same land, did not adopt a religious point of view and did not necessarily endorse any specific meaning that might be seen in the monument. Red River Freethinkers v. City of Fargo, 764 F.3d 948 (8th Cir. 2014).

13 Van Orden v. Perry, 545 U.S. 677, 125 S. Ct. 2854, 162 L. Ed. 2d 607 (2005).

14 American Civil Liberties Union of Kentucky v. Grayson County, Ky., 591 F.3d 837 (6th Cir. 2010).

15 American Legion v. American Humanist Association, 139 S. Ct. 2067, 204 L. Ed. 2d 452 (2019).

16 Weinbaum v. City of Las Cruces, N.M., 541 F.3d 1017, 236 Ed. Law Rep. 575 (10th Cir. 2008).

17 McCreary County, Ky. v. American Civil Liberties Union of Ky., 545 U.S. 844, 125 S. Ct. 2722, 162 L. Ed. 2d 729, 15 A.L.R. Fed. 2d 865 (2005) (a preliminary injunction preventing counties from displaying a revised display of the 10 Commandments that included other historical documents in a courthouse was adequately supported by evidence that the counties' purpose was to emphasize and celebrate the commandments' religious message, in violation of the First Amendment).

18 Chabad of Mid-Hudson Valley v. City of Poughkeepsie, 76 A.D.3d 693, 907 N.Y.S.2d 286 (2d Dep't 2010).

19 Okrand v. City of Los Angeles, 207 Cal. App. 3d 566, 254 Cal. Rptr. 913 (2d Dist. 1989).

20 Felix v. City of Bloomfield, 841 F.3d 848 (10th Cir. 2016).

21 Felix v. City of Bloomfield, 841 F.3d 848 (10th Cir. 2016).

22 Freedom from Religion Foundation, Inc. v. City of Warren, Mich., 707 F.3d 686 (6th Cir. 2013).

23 Chamberlin v. Dade County, Bd. of Public Instruction, 377 U.S. 402, 84 S. Ct. 1272, 12 L. Ed. 2d 407 (1964).

24 Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly, 309 F.3d 144 (3d Cir. 2002).

25 Sevier v. Lowenthal, 302 F. Supp. 3d 312 (D.D.C. 2018), appeal dismissed, 2018 WL 5603628 (D.C. Cir. 2018).

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**16A Am. Jur. 2d Constitutional Law § 446**

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**IX. Fundamental Constitutional Rights and Privileges**

**C. Particular Fundamental Constitutional Rights**

**1. First Amendment Rights Guaranteed by Constitution**

**b. Religious Freedom Guaranteed by Constitution**

**(4) Particular Applications of Religious Freedom under Constitution**

# § 446. Distribution of religious tracts or pamphlets subject to Religion Clauses of Constitution

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 1389, 1879

Colporteuring, or the distribution of religious tracts, pamphlets, or books, has enjoyed consistent protection by the Supreme Court over the years, resulting in the invalidation of most attempts by states or municipalities to limit the practice or to exact license fees from colporteurs on the ground that such attempts constitute unwarranted restrictions on the free exercise of religion,[1] the sole exceptions being those few regulations the Court felt were justified under the state's police power.[2]

The religious ritual of "sankirtan," which requires roving devotees of Krishna Consciousness to approach the uninitiated, to inform them of the precepts of religion and to seek monetary donations, is "religious activity" deserving free exercise protection when the devotees' beliefs in the importance of the practice are genuine to sufficient degree to be entitled to free exercise protection and the practice is essential to the religion.[3] A ban on a nonprofit religious corporation's distribution of literature in port authority airport terminals was invalid under the First Amendment.[4]

The public streets on which a demonstrator wished to exercise First Amendment rights by distributing literature, preaching, and displaying a religious message remained a traditional public forum, notwithstanding a nonexclusive block party permit issued to a private organization to hold an art festival from which the demonstrator was excluded; the demonstrator was seeking general access to public property and was not seeking to be included in any collective message of the permit holder, and, in fact, was merely another attendee of the festival which was open to the community at large.[5]

  

Footnotes

1 Tucker v. State of Tex., 326 U.S. 517, 66 S. Ct. 274, 90 L. Ed. 274 (1946); Marsh v. State of Ala., 326 U.S. 501, 66 S. Ct. 276, 90 L. Ed. 265 (1946); Follett v. Town of McCormick, S.C., 321 U.S. 573, 64 S. Ct. 717, 88 L. Ed. 938, 152 A.L.R. 317 (1944).
As to licensing solicitors, see § 449.

2 Prince v. Massachusetts, 321 U.S. 158, 64 S. Ct. 438, 88 L. Ed. 645 (1944) (justification for restriction was the child labor laws).

3 International Soc. For Krishna Consciousness, Inc. v. Barber, 650 F.2d 430 (2d Cir. 1981).

4 Lee v. International Soc. for Krishna Consciousness, Inc., 505 U.S. 830, 112 S. Ct. 2709, 120 L. Ed. 2d 669 (1992).

5 Parks v. City of Columbus, 395 F.3d 643, 2005 FED App. 0040P (6th Cir. 2005).

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# 16A Am. Jur. 2d Constitutional Law § 447

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**IX. Fundamental Constitutional Rights and Privileges**

**C. Particular Fundamental Constitutional Rights**

**1. First Amendment Rights Guaranteed by Constitution**

**b. Religious Freedom Guaranteed by Constitution**

**(4) Particular Applications of Religious Freedom under Constitution**

## § 447. Health matters, medical treatment, and right-to-die laws subject to Religion Clauses of Constitution

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 1395 to 1399

**A.L.R. Library**

Regulation of health devices under Federal Food, Drug, and Cosmetic Act (21 U.S.C.A. secs. 301 et seq.) as affected by religious guaranties of First Amendment, 13 A.L.R. Fed. 747

The courts have approved compulsory vaccination or immunization laws against freedom-of-religion objections.[1]

A state regulation governing licensing of abortion clinics by requiring clinics to have "arrangements" for referring patients to clergy "as needed" did not on its face establish religion in violation of the First Amendment; the regulation did not require abortion clinics to become involved in religion to counsel their patients in religion or to make any religious judgments.[2] State rules requiring a pharmacy to deliver or dispense drugs, and containing secular but not religious exemptions, were operationally neutral, for purposes of determining the level of scrutiny for a violation of the Free Exercise Clause, where the

  

rules allowed pharmacies to accommodate religious objections of pharmacists, the delivery requirement for pharmacies applied to all objections to delivery that did not fall within an exemption, regardless of the motivation behind those objections, the delivery requirement applied to all prescription products rather than just emergency contraceptives, and the agency's decision not to allow facilitated referrals did not demonstrate discriminatory intent.[3]

The First Amendment's Religion Clauses do not allow parents to impose their own religious views on their children to the extent of exposing them, by withholding life-saving medical treatment or assistance, to communicable diseases, ill health, or death.[4] Thus, the free exercise of religion rights of Jehovah's Witnesses were not violated by court-ordered life-saving medical assistance (such as blood transfusions) for their children in pursuance of a state statute authorizing medical treatment for neglected children.[5] A state statute requiring a blood test to determine if a newborn child has a metabolic or genetic disorder did not violate the free exercise of religion.[6]

Medicare and Medicaid Act amendments permitting payments for care rendered at "religious nonmedical health care institutions" (RNHCIs) did not violate the Establishment Clause. The amendments enabled persons whose religious tenets lead them to reject medical services to receive governmental support comparable to that furnished to others, and did not advance Christian Scientist church, indoctrinate, symbolize government approval of faith healing, compel any belief, or convert physical services provided into pervasively sectarian activity.[7] There was valid secular purpose behind provisions in Medicare and Medicaid Acts which permit persons who hold religious objections to medical care to receive government assistance for nonmedical care rendered at RNHCIs, and which also free RNHCIs from all medically based supervision; such permissive accommodation was warranted, as, without provisions in question, persons who hold religious objections to medical care would be forced to choose between adhering to their religious beliefs and foregoing all government health care benefits, or violating their religious convictions and receiving medical care provided by Medicare and Medicaid.[8]

A state law prohibiting licensed mental health providers from providing sexual orientation change efforts therapy to children under 18 did not excessively entangle the state with religion, in violation of the mental health providers' rights under the Establishment Clause, since the law regulated conduct only within confines of counselor-client relationship, and professionals were in no practical danger of enforcement of the law outside the confines of a counselor-client relationship; the legislature's purpose was to protect the physical and psychological wellbeing of minors and applied without regard to the nature of minors' motivations for seeking treatment, i.e. without regard to whether the minor had a religious motivation.[9]

Physicians' First Amendment right to free exercise of religion did not exempt them from conforming their conduct to the Unruh Civil Rights Act requirement to provide "full and equal accommodations, advantages, facilities, privileges, or services" to all persons notwithstanding their sexual orientation by providing fertility treatment to lesbian patients, even if compliance posed an incidental conflict with physicians' religious beliefs, since the Act was a valid and neutral law of general applicability.[10]

Ordinances intended to prohibit the ritual slaughter of animals violated the Free Exercise Clause because they were not of general applicability despite a claim that they were related to a city's interest in public health which supposedly was threatened by the disposal of animal carcasses in open public places and the consumption of uninspected meat. The ordinances were underinclusive with respect to that interest as they did not deal with the consumption of meat or the disposal of carcasses by hunters and fishers.[11]

There is no federal constitutional "right-to-die," nor is there any federal constitutional right to physician-assisted suicide for terminally ill patients.[12]

Footnotes

1 Am. Jur. 2d, Health § 70; Am. Jur. 2d, Schools § 345.

2 Greenville Women's Clinic v. Commissioner, South Carolina Dept. of Health and Environmental Control, 317 F.3d 357 (4th Cir. 2002).

3 Stormans, Inc. v. Wiesman, 794 F.3d 1064 (9th Cir. 2015).

4 Am. Jur. 2d, Infants § 25.

5 Banks v. Medical University of South Carolina, 314 S.C. 376, 444 S.E.2d 519, 91 Ed. Law Rep. 1188 (1994).

6 In re Interest of Anaya, 276 Neb. 825, 758 N.W.2d 10 (2008).

7 Kong v. Scully, 341 F.3d 1132 (9th Cir. 2003), opinion amended on other grounds on denial of reh'g, 357 F.3d 895 (9th Cir. 2004).

8 Children's Healthcare Is a Legal Duty, Inc. v. Min De Parle, 212 F.3d 1084 (8th Cir. 2000).

9 Welch v. Brown, 834 F.3d 1041 (9th Cir. 2016), as amended on denial of reh'g and reh'g en banc (Oct. 3, 2016).

10 North Coast Women's Care Medical Group, Inc. v. Superior Court, 44 Cal. 4th 1145, 81 Cal. Rptr. 3d 708, 189 P.3d 959 (2008).

11 Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993).

12 Washington v. Glucksberg, 521 U.S. 702, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997).

**End of Document**

# 16A Am. Jur. 2d Constitutional Law § 448

**American Jurisprudence, Second Edition** | May 2021 Update

**Constitutional Law**
Barbara J. Van Arsdale, J.D.; James Buchwalter, J.D; Paul M. Coltoff, J.D.; John A. Gebauer, J.D.; Lonnie E. Griffith, Jr., J.D.; Janice Holben, J.D.; Sonja Larsen, J.D.; Lucas Martin, J.D.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Karl Oakes, J.D.; Karen L. Schultz, J.D.; Jeffrey J. Shampo, J.D.; and Kimberly C. Simmons, J.D.

**IX. Fundamental Constitutional Rights and Privileges**

**C. Particular Fundamental Constitutional Rights**

**1. First Amendment Rights Guaranteed by Constitution**

**b. Religious Freedom Guaranteed by Constitution**

**(4) Particular Applications of Religious Freedom under Constitution**

## § 448. Judicial and legislative proceedings subject to Religion Clauses of Constitution

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 1314 to 1317, 1322, 1420

**A.L.R. Library**

Constitutionality of Legislative Prayer Practices, 30 A.L.R.6th 459
Wearing of Religious Symbols in Courtroom as Protected by First Amendment, 18 A.L.R.6th 775

**Trial Strategy**

Proof of Religion in the Courtroom That Violates the Right to a Fair Trial, 73 Am. Jur. Proof of Facts 3d 89

  

A traditional Establishment Clause inquiry is appropriate in a challenge to a judge's practice of beginning court with a prayer, and when the practice has the primary effect of advancing and endorsing religion, and involves excessive entanglement of government with religion, there is a violation of the Establishment Clause—the general exemption of prayers at the beginning of legislative sessions is not applicable in this context.[1] With regard to matters of courtroom decorum or procedures, it is not a violation of First Amendment religious rights for a judge to insist on a defendant's rising out of respect for institutionalized courts.[2] However, it may be a violation to require a priest who is also a lawyer to remove the priest's clerical garb while in court representing a defendant in a criminal trial,[3] and civil defendant's right to the free exercise of religion was violated by requiring the defendant to remove a skullcap in the courtroom, contrary to the requirements of the defendant's religion.[4] A state court's order that a cross worn by a defendant be placed inside the defendant's shirt during a trial for assault and robbery violated the defendant's constitutional right to the free exercise of religion, when the court gave the order without conducting an inquiry into the substance and sincerity of a codefendant's belief.[5] Similarly, a trial judge who refused to allow man to appear in courtroom while wearing prayer cap without attempting to discover the nature and sincerity of the religious beliefs expressed in the wearing of a prayer cap or whether such beliefs precluded removing it in court, unjustifiably infringed on religious freedoms granted by the Free Exercise Clause.[6]

A state governor's directive, instructing all county clerks to issue marriage licenses to same-sex couples in compliance with the United States Supreme Court's decision, did not substantially burden a county clerk's rights under the Free Exercise Clause, since the state was not asking the clerk to condone same-sex unions on moral or religious grounds, and the clerk could continue personal religious beliefs that marriage could only be by the union of a man and a woman.[7] A state supreme court applied a strict scrutiny analysis to a free exercise claim on a petition filed by a judge and part-time magistrate who refused to perform same-sex marriages, thus requiring the court to determine whether the discipline of removal served a compelling state interest and was narrowly tailored to serve that interest; the court ruled that no judge is permitted to substitute a personal concept of what the law ought to be for what the law actually is nor to insist that in pursuit of a judge's personal interests that others must conform their conduct to the judge's own religious necessities.[8]

A strict scrutiny Establishment Clause test, whereby a law that discriminates among religions survives only if it is closely fitted to furtherance of a compelling interest, applied to sustain a Muslim Oklahoma resident's Establishment Clause challenge to proposed amendment to the Oklahoma Constitution that forbade state courts from considering or using international or Sharia law, where the amendment discriminated among religions by drawing an explicit and deliberate distinction regarding Sharia law, and the state did not identify and support any reason to single out and restrict Sharia law in its courts, nor specify any actual problem that the amendment sought to solve.[9]

The practice of having prayers at sessions of deliberative public bodies generally does not violate the Establishment Clause or the Free Exercise Clause of the First Amendment.[10] The relevant constraint on legislative prayer under the Establishment Clause derives from its place at the opening of legislative sessions, where it is meant to lend gravity to the occasion and reflect values long part of the Nation's heritage; prayer that is solemn and respectful in tone, that invites lawmakers to reflect upon shared ideals and common ends before they embark on the fractious business of governing, serves that legitimate function.[11] Thus, legislative prayer is exempt from a typical Establishment Clause analysis[12] and fits into a special nook—a narrow space tightly sealed off from otherwise applicable First Amendment doctrine; however, the court must ask whether prayer practice in question fits within tradition long followed in Congress and state legislatures,[13] identify the essential characteristics of the practice and then determine whether it falls within the tradition recognized as consistent with the Establishment Clause.[14] The court must undertake a fact-sensitive inquiry, in which it takes into account the setting in which the prayer arises and the audience to whom it is directed, the content of the prayer, and the backdrop of historical practice.[15] Prayers at start of meeting of legislative or other public body must be arranged and delivered in nondiscriminatory ways,[16] and may not proselytize or advance any one, or disparage any other, faith or belief.[17] The government may not mandate civic religion by requiring that guest chaplains offer

  

only nonsectarian prayer.[18] The courts avoid becoming involved in reviewing or approving specific prayers at start of meeting of legislative or other public body.[19]

A state legislature's exclusion of secular—but not religious—prayer does not violate Establishment Clause,[20] but its proposal to limit legislative prayer to two sects would violate the Establishment Clause.[21] A state house of representatives did not impermissibly direct or control the content of prayers delivered by guest chaplains, in violation of the Establishment Clause, when no house member reviewed the guest chaplain's prayer ahead of time, and the chaplains were simply instructed to be "respectful of all religious beliefs" and encouraged to "deliver an inter-faith prayer."[22]

Prayer opening town board meetings does not have to be nonsectarian, or not identifiable with any one religion, in order to comply with the Establishment Clause.[23] A town board did not violate the First Amendment by opening its meetings with a prayer that comported with the tradition of the United States; although a number of the prayers did invoke the name of Jesus, the Heavenly Father, or the Holy Spirit, they also invoked universal themes, as by celebrating the changing of the seasons or calling for a "spirit of cooperation" among town leaders.[24] A town board did not contravene the Establishment Clause by inviting a predominantly Christian set of ministers to lead the prayer opening its meetings, where it made reasonable efforts to identify all of the congregations located within its borders and represented that it would welcome a prayer by any minister or layman who wished to give one; that nearly all of the congregations in town turned out to be Christian did not reflect an aversion or bias on the part of town leaders against minority faiths—so long as a town maintains a policy of nondiscrimination in inviting ministers and laymen to lead a prayer at its meetings, the Establishment Clause does not require it to search beyond its borders for non-Christian prayer givers in an effort to achieve religious balancing.[25] A court may not view the coercive effect of prayers at local government meetings differently from the effect of prayers at legislative sessions because local government meetings are small, intimate, and often involve citizens raising issues that most immediately affect their lives.[26]

A local public school board's policy and practice of starting the open-to-public portion of board meetings with an invocation did not fall under the legislative-prayer tradition, and thus was not exempt from a typical Establishment Clause analysis, where many members of the audience and active participants in meetings were children and adolescents, including a student representative who sat on the board and participated in the board's deliberations. The history of public schools in the United States, and their intersection with the Establishment Clause, does not support the application of the legislative-prayer exception to the practices of public school boards, including school-board prayer.[27]

With respect to jury service, the exclusion of a person because of a lack of belief in a supreme being is in violation of the United States Constitution, and a juror cannot constitutionally be required to demonstrate a belief in God as a condition to serving as a juror,[28] but the religious belief, affiliation, or prejudice of a prospective juror is a proper subject of inquiry on voir dire or a proper ground of challenge for cause.[29]

Competency to appear and testify as a witness may not be made dependent on religious belief,[30] and constitutional religious protections permit a witness to take a modified oath or some alternative form of serious public commitment to answer truthfully that does not transgress sincerely held beliefs.[31]



Footnotes

1 North Carolina Civil Liberties Union Legal Foundation v. Constangy, 947 F.2d 1145 (4th Cir. 1991).

2 In re Chase, 468 F.2d 128 (7th Cir. 1972).

3 People v. Rodriguez, 101 Misc. 2d 536, 424 N.Y.S.2d 600 (Sup 1979).

4 Close-It Enterprises, Inc. v. Weinberger, 64 A.D.2d 686, 407 N.Y.S.2d 587 (2d Dep't 1978).

5 State v. Tate, 682 N.W.2d 169, 18 A.L.R.6th 895 (Minn. Ct. App. 2004).

6 In re Palmer, 120 R.I. 250, 386 A.2d 1112 (1978).

7 Miller v. Davis, 123 F. Supp. 3d 924 (E.D. Ky. 2015), stay pending appeal denied, 2015 WL 10692640 (6th Cir. 2015) and stay pending appeal denied, 2015 WL 10692638 (6th Cir. 2015).

8 In re Neely, 2017 WY 25, 390 P.3d 728 (Wyo. 2017), cert. denied, 138 S. Ct. 639, 199 L. Ed. 2d 527 (2018).

9 Awad v. Ziriax, 670 F.3d 1111 (10th Cir. 2012).

10 Town of Greece, N.Y. v. Galloway, 572 U.S. 565, 134 S. Ct. 1811, 188 L. Ed. 2d 835 (2014); Freedom From Religion Foundation, Inc. v. Chino Valley Unified School District Board of Education, 896 F.3d 1132, 356 Ed. Law Rep. 915 (9th Cir. 2018).

11 Town of Greece, N.Y. v. Galloway, 572 U.S. 565, 134 S. Ct. 1811, 188 L. Ed. 2d 835 (2014).

12 Freedom From Religion Foundation, Inc. v. Chino Valley Unified School District Board of Education, 896 F.3d 1132, 356 Ed. Law Rep. 915 (9th Cir. 2018).

13 Fields v. Speaker of Pennsylvania House of Representatives, 936 F.3d 142 (3d Cir. 2019).

14 Barker v. Conroy, 921 F.3d 1118 (D.C. Cir. 2019).

15 Freedom From Religion Foundation, Inc. v. Chino Valley Unified School District Board of Education, 896 F.3d 1132, 356 Ed. Law Rep. 915 (9th Cir. 2018).

16 Fields v. Speaker of Pennsylvania House of Representatives, 936 F.3d 142 (3d Cir. 2019).

17 Freedom From Religion Foundation, Inc. v. Chino Valley Unified School District Board of Education, 896 F.3d 1132, 356 Ed. Law Rep. 915 (9th Cir. 2018); Williamson v. Brevard County, 928 F.3d 1296 (11th Cir. 2019).

18 Fields v. Speaker of Pennsylvania House of Representatives, 936 F.3d 142 (3d Cir. 2019).

19 Williamson v. Brevard County, 928 F.3d 1296 (11th Cir. 2019).

20 Fields v. Speaker of Pennsylvania House of Representatives, 936 F.3d 142 (3d Cir. 2019).
The Chaplain of the House of Representatives did not violate the Establishment Clause by denying an atheist activist's request to serve as guest chaplain and deliver a secular invocation to the House in lieu of the usual legislative prayer, where Rulemaking Clause clearly reserved to each House of the Congress the authority to make its own rules, the House of Representatives permissibly limited opening prayer to religious prayer, and legislative prayer was consistent with the Establishment Clause. Barker v. Conroy, 921 F.3d 1118 (D.C. Cir. 2019).

21 Fields v. Speaker of Pennsylvania House of Representatives, 936 F.3d 142 (3d Cir. 2019).

22 Fields v. Speaker of Pennsylvania House of Representatives, 936 F.3d 142 (3d Cir. 2019).

23 Town of Greece, N.Y. v. Galloway, 572 U.S. 565, 134 S. Ct. 1811, 188 L. Ed. 2d 835 (2014).

24 Town of Greece, N.Y. v. Galloway, 572 U.S. 565, 134 S. Ct. 1811, 188 L. Ed. 2d 835 (2014).

25 Town of Greece, N.Y. v. Galloway, 572 U.S. 565, 134 S. Ct. 1811, 188 L. Ed. 2d 835 (2014).

26 Bormuth v. County of Jackson, 870 F.3d 494 (6th Cir. 2017), cert. denied, 138 S. Ct. 2708, 201 L. Ed. 2d 1100 (2018).

27 Freedom From Religion Foundation, Inc. v. Chino Valley Unified School District Board of Education, 896 F.3d 1132, 356 Ed. Law Rep. 915 (9th Cir. 2018).

28 Am. Jur. 2d, Jury § 154.

29 Am. Jur. 2d, Jury § 238.

30 Am. Jur. 2d, Witnesses § 158.

31 Am. Jur. 2d, Witnesses § 628.

**End of Document**

# 16A Am. Jur. 2d Constitutional Law § 449

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**IX. Fundamental Constitutional Rights and Privileges**

**C. Particular Fundamental Constitutional Rights**

**1. First Amendment Rights Guaranteed by Constitution**

**b. Religious Freedom Guaranteed by Constitution**

**(4) Particular Applications of Religious Freedom under Constitution**

## § 449. Licenses and permits subject to Religion Clauses of Constitution

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 1391 to 1393

Prohibitions against the use of public streets or parks for religious purposes, such as meetings, parades, solicitation of contributions, or distribution of literature, without obtaining a permit as required by state or local law, have been sustained as against claims of violation of First Amendment rights as to free exercise of religion, where the courts have concluded that the regulations were reasonable, specific, and necessary for the public good.[1] Prohibitions have been overturned when the courts have found that the authorities specified in the regulation had arbitrary or unlimited power to reject requests for such permits[2] or where such power was derived only from local practice not defined by any standards or limitations.[3]

An ordinance imposing a flat license tax, not a mere nominal fee, for the privilege of canvassing or soliciting within a municipality is, when applied to religious colporteurs engaged in the dissemination of their religious beliefs through the sale of books and pamphlets by solicitation from house to house, an unconstitutional invasion of the right of freedom of religion.[4] The constitutional guarantee of religious freedom precludes the exacting of a book agent's license fee from a distributor of religious literature as a means of spreading the distributor's religious beliefs although the distributor's activities are confined to the distributor's home town and the distributor's livelihood depends on contributions requested in return for the literature distributed.[5]

  

A city's adoption of ordinances making existing nuisance and liquor license regulations applicable to bottle clubs and other businesses where alcohol was consumed during live or video nude dancing performances did not violate the Establishment Clause, even if the ordinances were passed based on elected officials' personal religious beliefs and objections, where the ordinances appear otherwise neutral.[6]

A county's goal of protecting churches and schools from disruption associated with liquor serving establishments was a valid secular purpose for an ordinance banning such beverages within 2500 feet of schools and churches, as required for the county to overcome liquor license applicant's challenge under the Establishment Clause, since the ordinance did not accord churches any authority that could be used for explicitly religious goals, did not provide for any exercise of legislative authority by churches in conjunction with the county or give the appearance of such, and did not vest authority in schools or churches to veto, either expressly or effectively, an application for a liquor license or to make zoning decisions of any sort.[7] However, the Establishment Clause is violated by giving a church "veto power" over the issuance of licenses or permits to secular businesses of which it disapproves, as where a restaurant, which had been refused the issuance of a liquor license by a city solely because of opposition filed by a nearby church, brought suit challenging the constitutionality of the state statute governing the issuance of liquor licenses within 500 feet of a church or school, since the statute vested in the governing bodies of churches and schools the power effectively to veto applications for liquor licenses within a 500-foot radius of the church or school.[8]

A charitable solicitation statute which imposes certain registration and reporting requirements only upon those religious organizations that solicit more than 50% of their funds from nonmembers discriminates against such organizations in violation of the Establishment Clause of the First Amendment.[9]

A village ordinance that required individuals to obtain a permit prior to engaging in door-to-door advocacy and to display on demand the permit, containing one's name, violated the First Amendment as it applied to religious proselytizing, since the ordinance necessarily resulted in the surrender of anonymity of individuals supporting the causes, the permit requirement imposed an objective burden on some speech of citizens holding religious, and the ordinance was not tailored to the village's interest in preventing fraud, the privacy of residents, and the prevention of crime.[10]

A state's "I Believe" Act, which authorized its Department of Motor Vehicles to issue a license plate requiring the words "I Believe" and a cross superimposed on a stained glass window, violated the Establishment Clause, since the overtly Christian design of the "I Believe" plate, which was the sole subject of the legislation, was sufficient to establish that the challenged statute was motivated by a purpose to advance religion, specifically Christianity, the primary effect of the statute was the state endorsement of Christianity, and the statute excessively entangled the state in religion.[11]

A nonprofit organization's "Choose Life" motto, which it desired on picture plates under a state's license plate specialty program for various organizations and causes, implicated a religious message, and was thereby subject to an Establishment Clause neutrality defense on the part of the deputy commissioner of the State Department of Motor Vehicles.[12]

Federal and state statutes requiring the collection of social security numbers of applicants for professional contractor licenses in order to improve child support enforcement effectiveness were subject to rational basis review on a contractor license applicant's claim that the statutes violated the right to the free exercise of religion, where the statutes applied to all applicants for professional licenses, and did not single out a class of religious people who, as an element of exercise of their religion, objected to the use of social security numbers.[13]

A requirement of a State Division of Motor Vehicles, that applicants disclose their social security number as condition of obtaining a driver's license, did not violate the applicants' First Amendment free exercise rights; the requirement was valid and neutral, and nonuse of social security number was not deep religious conviction, shared by an organized group, and intimately related to daily living.[14] A state's denial of a driver's license for the applicant's refusal to provide a social security number did not

  

violate the applicant's right to free exercise of religion, although the refusal was based on religious belief, since the applicable statute was facially neutral and rationally related to the state's legitimate interests.[15] A state had a compelling interest in requiring the inclusion of the applicant's social security number for a driver's license renewal, predicated on the receipt of funding under federal law mandating procedures to improve the effectiveness of child support enforcement, and did not violate the free exercise of religion by an applicant whose genuinely held religious beliefs prohibited providing a social security number.[16]



Footnotes

1 Poulos v. State of N.H., 345 U.S. 395, 73 S. Ct. 760, 97 L. Ed. 1105, 30 A.L.R.2d 987 (1953); Cox v. State of New Hampshire, 312 U.S. 569, 61 S. Ct. 762, 85 L. Ed. 1049, 133 A.L.R. 1396 (1941).

2 Kunz v. People of State of New York, 340 U.S. 290, 71 S. Ct. 312, 95 L. Ed. 280 (1951); Largent v. State of Tex., 318 U.S. 418, 63 S. Ct. 667, 87 L. Ed. 873 (1943); Cantwell v. State of Connecticut, 310 U.S. 296, 60 S. Ct. 900, 84 L. Ed. 1213, 128 A.L.R. 1352 (1940).

3 Niemotko v. State of Md., 340 U.S. 268, 71 S. Ct. 325, 95 L. Ed. 267 (1951).

4 Murdock v. Com. of Pennsylvania, 319 U.S. 105, 63 S. Ct. 870, 87 L. Ed. 1292, 146 A.L.R. 81 (1943).
As to distribution of religious literature, generally, see § 446.

5 Follett v. Town of McCormick, S.C., 321 U.S. 573, 64 S. Ct. 717, 88 L. Ed. 938, 152 A.L.R. 317 (1944).

6 Harrington v. Strong, 363 F. Supp. 3d 984 (D. Neb. 2019).

7 VFW John O'Connor Post #4833 v. Santa Rosa County, Florida, 506 F. Supp. 2d 1079 (N.D. Fla. 2007).

8 Larkin v. Grendel's Den, Inc., 459 U.S. 116, 103 S. Ct. 505, 74 L. Ed. 2d 297 (1982).
A municipal regulation prohibiting the grant of a liquor license application made by enterprise located within 400 feet of a church with 100 or more members, without the consent of the church, violated the Establishment Clause, since the regulation delegated important governmental function to a religious entity. Espresso, Inc. v. District of Columbia, 884 F. Supp. 7 (D.D.C. 1995).

9 Larson v. Valente, 456 U.S. 228, 102 S. Ct. 1673, 72 L. Ed. 2d 33 (1982).

10 Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton, 536 U.S. 150, 122 S. Ct. 2080, 153 L. Ed. 2d 205 (2002).

11 Summers v. Adams, 669 F. Supp. 2d 637 (D.S.C. 2009), as corrected, (Dec. 14, 2009).

12 Children First Foundation, Inc. v. Martinez, 631 F. Supp. 2d 159 (N.D. N.Y. 2007).

13 Ricks v. State Contractors Board, 164 Idaho 689, 435 P.3d 1 (Ct. App. 2018), review denied, (Mar. 12, 2019).

14 North Carolina ex rel. Kasler v. Howard, 323 F. Supp. 2d 675 (W.D. N.C. 2003), aff'd, 78 Fed. Appx. 231 (4th Cir. 2003).

15 Miller v. Reed, 176 F.3d 1202, 163 A.L.R. Fed. 739 (9th Cir. 1999).

16 Champion v. Secretary of State, 281 Mich. App. 307, 761 N.W.2d 747 (2008).

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**b. Religious Freedom Guaranteed by Constitution**

**(4) Particular Applications of Religious Freedom under Constitution**

## § 450. Domestic relations matters subject to Religion Clauses of Constitution

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 1405 to 1410

The right to marry is a fundamental right inherent in the liberty of the person, inclusive of persons of the same sex, but personal religious and philosophical objections to gay marriage are protected under the First Amendment.[1] Historically, it is recognized that the state has a legitimate and compelling interest in protecting the institution of marriage and that it is permissible, notwithstanding the Free Exercise Clause of the First Amendment, to prohibit and make criminal the practice of bigamy and polygamy, even where such practices are engaged in because of religious beliefs.[2]

A parent's right to determine the religious upbringing of the parent's child derives from the parent's right to exercise religion freely,[3] but religious considerations bearing on the qualification of prospective adoptive parents can violate the Establishment and Free Exercise Clauses.[4]

Divorce is entirely a creature of statute in the United States, and the power of the legislatures of the several states over the subject of marriage as a civil status and its dissolution is unlimited and supreme except as restricted by the Constitution.[5] Defenses in divorce proceedings are not subject to constitutional guarantee of the free exercise of religion.[6] In determining the custody of children on dissolution of a marriage, the courts preserve an attitude of impartiality among religions and will not disqualify a parent solely because of the parent's religious beliefs.[7]

  

**Reminder:**

The endorsement test for determining whether a violation of the First Amendment's Establishment Clause has occurred[8] looks for state action that communicates a government's endorsement of a religion or a particular religious belief; such endorsement is especially concerning when impressionable children are involved.[9]



Footnotes

1 Am. Jur. 2d, Marriage § 51.

2 Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. U.S., 136 U.S. 1, 10 S. Ct. 792, 34 L. Ed. 478 (1890); Reynolds v. U.S., 98 U.S. 145, 25 L. Ed. 244, 1878 WL 18416 (1878).

3 Am. Jur. 2d, Parent and Child § 24.

4 Am. Jur. 2d, Adoption § 140.

5 Am. Jur. 2d, Divorce and Separation § 6.

6 Am. Jur. 2d, Divorce and Separation § 107.

7 Am. Jur. 2d, Divorce and Separation § 799.

8 § 430.

9 Freedom From Religion Foundation, Inc. v. Concord Community Schools, 885 F.3d 1038, 352 Ed. Law Rep. 987 (7th Cir. 2018).

**End of Document**

# 16A Am. Jur. 2d Constitutional Law § 451

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## § 451. Military service or instruction subject to Religion Clauses of Constitution; conscientious objection

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 1326

When evaluating whether military needs justify a particular restriction on religiously motivated conduct, courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest.[1] In the absence of a showing that promotional practices challenged under the First Amendment's Establishment Clause facially prefer one religion over another, the general test for an Establishment Clause violation will apply, rather than a strict scrutiny review requiring justification of a violation by a compelling interest.[2] Under this standard, a Navy's chaplain promotion procedures did not have primary effect of advancing religion, or a purpose or effect of endorsing religion, and, thus, did not violate the Establishment Clause as applied to a chaplain who was denied a promotion, where chaplains were chosen to sit on promotion boards because they were officers belonging to same competitive category as the officer being considered for promotion, not because they were members of religious sect or denomination, and the same practices regarding board size and composition, method of voting, and method of reviewing a candidate's record were employed by other promotion boards considering other Navy officers.[3]

The Religion Clauses of the First Amendment neither prohibit nor compel universal military conscription; it does not violate the Free Exercise Clause to draft all otherwise eligible persons into the military in spite of the fact that some might have

  

religious scruples against military service,[4] but Congress may grant statutory exemptions to certain groups, such as conscientious objectors, ministers, and theological students, without violating the Establishment Clause.[5]

The First Amendment religious rights of students who voluntarily enroll at a state university and who are aware that one condition of continued enrollment is their participation in a course of military instruction are not violated by such a requirement.[6] However, the Establishment Clause was violated by regulations of the various service academies requiring that all cadets attend church or chapel services.[7]



Footnotes

1 Goldman v. Weinberger, 475 U.S. 503, 106 S. Ct. 1310, 89 L. Ed. 2d 478 (1986).

2 Harkness v. Secretary of Navy, 858 F.3d 437 (6th Cir. 2017), cert. denied, 138 S. Ct. 2648, 201 L. Ed. 2d 1049 (2018).

3 Harkness v. Secretary of Navy, 858 F.3d 437 (6th Cir. 2017), cert. denied, 138 S. Ct. 2648, 201 L. Ed. 2d 1049 (2018).

4 Am. Jur. 2d, Military, and Civil Defense § 56.

5 Am. Jur. 2d, Military, and Civil Defense §§ 92, 103, 109.

6 Hamilton v. Regents of the University of Calif., 293 U.S. 245, 55 S. Ct. 197, 79 L. Ed. 343 (1934).

7 Anderson v. Laird, 466 F.2d 283 (D.C. Cir. 1972).

**End of Document**

# 16A Am. Jur. 2d Constitutional Law § 452

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**b. Religious Freedom Guaranteed by Constitution**

**(4) Particular Applications of Religious Freedom under Constitution**

## § 452. Prison inmates subject to Religion Clauses of Constitution

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 1422 to 1427

**A.L.R. Library**

Validity, Construction, and Operation of Religious Land Use and Institutionalized Persons Act of 2000 (42 U.S.C.A. ss2000cc et seq.), 181 A.L.R. Fed. 247

Under the First Amendment, prison inmates must be provided a reasonable opportunity to exercise their religious freedom, subject to the fact of incarceration and valid penological objectives, such as the deterrence of crime, the rehabilitation of inmates, and institutional security.[1]

**Observation:**

The Federal Religious Land Use and Institutionalized Persons Act prohibits state and federal governments from placing any substantial burden on religious exercise by a person residing in or confined to an institution, except to further a compelling governmental interest,[2] and provides greater protections for religious exercise than the First Amendment.[3]



Footnotes

1 Am. Jur. 2d, Penal and Correctional Institutions § 38.

2 Cutter v. Wilkinson, 544 U.S. 709, 125 S. Ct. 2113, 161 L. Ed. 2d 1020 (2005) (referring to 42 U.S.C.A. § 2000cc-1).
For a discussion of the Act, see Am. Jur. 2d, Penal and Correctional Institutions § 40.

3 Greenhill v. Clarke, 944 F.3d 243 (4th Cir. 2019); Fox v. Washington, 949 F.3d 270 (6th Cir. 2020).

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# 16A Am. Jur. 2d Constitutional Law § 453

**American Jurisprudence, Second Edition** | May 2021 Update

**Constitutional Law**
Barbara J. Van Arsdale, J.D.; James Buchwalter, J.D; Paul M. Coltoff, J.D.; John A. Gebauer, J.D.; Lonnie E. Griffith, Jr., J.D.; Janice Holben, J.D.; Sonja Larsen, J.D.; Lucas Martin, J.D.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Karl Oakes, J.D.; Karen L. Schultz, J.D.; Jeffrey J. Shampo, J.D.; and Kimberly C. Simmons, J.D.

**IX. Fundamental Constitutional Rights and Privileges**

**C. Particular Fundamental Constitutional Rights**

**1. First Amendment Rights Guaranteed by Constitution**

**b. Religious Freedom Guaranteed by Constitution**

**(4) Particular Applications of Religious Freedom under Constitution**

## § 453. Private employment or labor subject to Religion Clauses of Constitution

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 1320, 1321, 1339(1) to 1340(4)

**A.L.R. Library**

Application of Age Discrimination in Employment Act (29 U.S.C.A. secs. 621 et seq.) to religious institutions, 136 A.L.R. Fed. 487

Effect of First Amendment on jurisdiction of National Labor Relations Board over labor disputes involving employer operated by religious entity, 63 A.L.R. Fed. 831

Religious groups are generally not immune from all governmental regulation of their employment relationships or from court enforcement of those laws,[1] but if the employment dispute between a church or religious entity and one of its employees would require resolution of issues of religious dogma, the court cannot hear the case.[2] While First Amendment values are implicated when resolution of an employment case turns on interpretations of religious doctrine and practice, if the court does not make a decision for or against any religious doctrine or practice, then this proscription is not violated.[3] The First Amendment does not

  

shield employment decisions made by religious organizations from civil court review if the decisions do not implicate religious beliefs, procedures or law.[4]

The Fair Labor Standards Act applies to religious entities, and its application to "associates" (i.e., employees) of a religious foundation's commercial enterprises does not violate the rights of the "associates" to freely exercise their religion or the right of the foundation to be free of excessive governmental entanglement in its affairs.[5] On the other hand, in view of the fact that the National Labor Relations Board's exercise of jurisdiction over lay teachers in church-operated schools would implicate the guarantees of the Religion Clauses of the First Amendment and in view of the absence of a clear expression of Congress's intent to bring teachers in church-operated schools within the jurisdiction of the Board, the Board is not authorized to exercise jurisdiction over the lay faculty members at church-operated schools.[6]

Under both Religion Clauses, religious organizations are free to hire and fire their ministerial leaders without governmental interference.[7] By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments; according the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.[8] The Religion Clauses prohibit the government from inserting itself into the appointments of ministers by churches or how churches structure their relations with clergy to implement and teach religious beliefs.[9] Any claim with associated remedy that would require church to employ minister would interfere with church's constitutionally protected choice of its ministers, and thereby would run afoul of Free Exercise Clause.[10] The "ministerial exception" of the First Amendment prohibits undue interference with the personnel decisions of churches and religious leaders, encompassing all employees of a religious institution, whether ordained or not, whose primary functions serve its spiritual and pastoral mission, and defendants are not required to advance a theological or religious explanation regarding its allegedly illegal employment actions.[11] The ministerial exception bars relief for consequences of protected employment decisions,[12] such as damages for lost or reduced pay, because such relief would necessarily trench on church's protected ministerial decisions.[13] However, the ministerial exception does not provide carte blanche to disregard antidiscrimination laws when it comes to other employees who do not serve a leadership role in the faith; when the exception does apply, the courts may decide disputes involving religious organizations, so long as the courts, in accordance with the Religion Clauses, proceed without resolving any underlying controversies over religious doctrine.[14] The ministerial exception did not bar a former teacher's claim under the Americans with Disabilities Act against a church elementary school that terminated the teacher's employment following a breast cancer diagnosis, although the teacher taught religious lessons four days a week and incorporated religious themes into curriculum, as the school required, since the school had no religious requirements for the teaching position, training consisted of only a half-day conference with limited religious substance, employment was at-will and on a yearlong renewable contract, students led class in prayers, the teacher did not have ministerial training or titles, and the teacher was not presented as a minister.[15]

The provisions of the Religious Freedom Restoration Act (RFRA), which exempt religious organizations from compliance with federal employment discrimination laws, do not violate the Establishment Clause, since RFRA has a secular legislative purpose, to protect individual First Amendment rights, is neutral, in that it reflects no purpose to promote a particular religious point of view, and its principal effect neither advances or inhibits religion.[16]

The denial of unemployment compensation benefits to a claimant who imposes a time restriction on availability for work because of religious beliefs constitutes an improper restriction of the free exercise of religion.[17]

The firing of an employee, as required by a union shop clause for failure to pay union dues where such failure was caused by the employee's religious convictions does not constitute denial of the right to the free exercise of religion.[18] Also, a denial of unemployment compensation benefits to a claimant who terminated a job because religious beliefs forbade participation in new

  

assigned job duties violates the First Amendment right to free exercise of religion, at least where the state has not shown a compelling interest in denying benefits and where the granting of benefits will not foster the establishment of religion.[19]

Under the Employee Retirement Income Security Act (ERISA), avoiding unnecessary entanglement with religion was a plausible secular purpose for the decision of Congress to expand ERISA's church-plan exemption to include plans maintained by principal-purpose organizations, as required for the exemption to withstand an Establishment Clause challenge, as nothing in the statutory text evinced an intent to favor one or all religions. The church-plan exemption did not convey an impermissible message that religion was favored or preferred, as required for the exemption to withstand an Establishment Clause challenge, and an accommodation of the exercise of religion was not a government endorsement of religion.[20]

The free exercise of religion by employees of a nonprofit, nonreligious, antiabortion organization was not substantially burdened by the contraceptive mandate of the Patient Protection and Affordable Care Act (ACA), requiring employers to provide contraception in health insurance plans, and employees to maintain such coverage.[21]



Footnotes

1 Gargano v. Diocese of Rockville Centre, 80 F.3d 87, 108 Ed. Law Rep. 78 (2d Cir. 1996); Hartwig v. Albertus Magnus College, 93 F. Supp. 2d 200, 143 Ed. Law Rep. 836 (D. Conn. 2000).

2 Drevlow v. Lutheran Church, Missouri Synod, 991 F.2d 468 (8th Cir. 1993); Hartwig v. Albertus Magnus College, 93 F. Supp. 2d 200, 143 Ed. Law Rep. 836 (D. Conn. 2000).

3 Hartwig v. Albertus Magnus College, 93 F. Supp. 2d 200, 143 Ed. Law Rep. 836 (D. Conn. 2000).

4 Drevlow v. Lutheran Church, Missouri Synod, 991 F.2d 468 (8th Cir. 1993).

5 Tony and Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290, 105 S. Ct. 1953, 85 L. Ed. 2d 278 (1985).

6 N.L.R.B. v. Catholic Bishop of Chicago, 440 U.S. 490, 99 S. Ct. 1313, 59 L. Ed. 2d 533 (1979).

7 Grussgott v. Milwaukee Jewish Day School, Inc., 882 F.3d 655, 351 Ed. Law Rep. 731 (7th Cir. 2018), cert. denied, 139 S. Ct. 456, 202 L. Ed. 2d 348 (2018).

8 Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C., 565 U.S. 171, 132 S. Ct. 694, 181 L. Ed. 2d 650, 274 Ed. Law Rep. 774 (2012).

9 Real Alternatives, Inc. v. Secretary Department of Health and Human Services, 867 F.3d 338 (3d Cir. 2017).

10 Puri v. Khalsa, 844 F.3d 1152 (9th Cir. 2017), for additional opinion, see, 674 Fed. Appx. 679 (9th Cir. 2017).

11 Starkman v. Evans, 198 F.3d 173 (5th Cir. 1999).

The music director at a church fell within the First Amendment's ministerial exception, which barred employment discrimination suits by ministers against their churches, as would bar music director's suit against the diocese and church, alleging that church terminated the director in violation of Age Discrimination in Employment Act and Americans with Disabilities Act; although the director was not ordained and lacked training or experience necessary to be worship leader, the director played an integral role in the celebration of Mass, furthered the mission of the church, and helped convey the message to congregants through the performance of music and the selection of hymns for Mass. Cannata v. Catholic Diocese of Austin, 700 F.3d 169 (5th Cir. 2012).

12 Equal Employment Opportunity Commission v. R.G. &. G.R. Harris Funeral Homes, Inc., 884 F.3d 560 (6th Cir. 2018), certiorari granted in part, 139 S. Ct. 1599, 203 L. Ed. 2d 754 (2019).

For a discussion of the ministerial exception under Title VII of the Civil Rights Act, operating as an affirmative defense to an otherwise cognizable claim under Title VII, see Am. Jur. 2d, Job Discrimination § 2153.

13 Puri v. Khalsa, 844 F.3d 1152 (9th Cir. 2017), for additional opinion, see, 674 Fed. Appx. 679 (9th Cir. 2017).

14 Biel v. St. James School, 911 F.3d 603, 361 Ed. Law Rep. 39 (9th Cir. 2018), cert. granted, 140 S. Ct. 680, 205 L. Ed. 2d 448 (2019).

15 Biel v. St. James School, 911 F.3d 603, 361 Ed. Law Rep. 39 (9th Cir. 2018), cert. granted, 140 S. Ct. 680, 205 L. Ed. 2d 448 (2019).

16 Hankins v. Lyght, 441 F.3d 96 (2d Cir. 2006).
As to RFRA, generally, see § 437.

17 Am. Jur. 2d, Unemployment Compensation § 152.

18 Yott v. North American Rockwell Corp., 501 F.2d 398 (9th Cir. 1974).

19 Am. Jur. 2d, Unemployment Compensation § 108.

20 Medina v. Catholic Health Initiatives, 877 F.3d 1213 (10th Cir. 2017).

21 Real Alternatives, Inc. v. Secretary Department of Health and Human Services, 867 F.3d 338 (3d Cir. 2017).

End of Document

# 16A Am. Jur. 2d Constitutional Law § 454

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**Constitutional Law**

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**IX. Fundamental Constitutional Rights and Privileges**

**C. Particular Fundamental Constitutional Rights**

**1. First Amendment Rights Guaranteed by Constitution**

**b. Religious Freedom Guaranteed by Constitution**

**(4) Particular Applications of Religious Freedom under Constitution**

## § 454. Church property or property of religious interest subject to Religion Clauses of Constitution

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 1382, 1401 to 1403

**A.L.R. Library**

Validity, Construction, and Application of Exclusion or Inclusion of Religious Uses/Places of Worship in Single-Family Residential Zoning Districts, 31 A.L.R.6th 395

Validity, Construction, and Operation of Religious Land Use and Institutionalized Persons Act of 2000 (42 U.S.C.A. ss2000cc et seq.), 181 A.L.R. Fed. 247

The First Amendment severely circumscribes the role that civil courts may play in resolving church property disputes, based on the substantial danger that the state will become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrinal beliefs.[1]

  

Since the state cannot establish churches, condemn land therefor, or compel church attendance, a church does not occupy the vantage point of a school and cannot have recourse to condemnation, and the right of a church to acquire property rests on no higher ground than that of any other citizen.[2] In cases involving contemplated condemnation of church property for a public purpose, the church is entitled to a hearing at which evidence should be presented and considered as to the relative interest of the condemnor as against that of the church under its rights of free exercise of religion.[3]

A municipality violated a church's free exercise rights by acting in bad faith and disingenuously misusing a state environmental review process to block the church's land development project, which was not itself barred by the municipal zoning code; the lengthy review process was costly to the church, and church was forced to remain in an inadequate facility for its duration.[4]

A city's sale of a plaza easement to a church did not have as its principal or primary effect to endorse or inhibit religion, as required to establish a violation of the Establishment Clause; the city did nothing to advance religion but merely enabled the church to advance itself.[5]

A Department of the Interior order withdrawing 19,685 acres of public mineral estate from a mineral location and entry for 20 years, pursuant to the Federal Land Policy and Management Act, did not violate the Establishment Clause, even though the order sought in part to protect areas of traditional spiritual importance to Native Americans, given that the Secretary of the Interior enunciated several secular purposes for the withdrawal, including protection of aquifers and the environment, that the order did not primarily affect religious interests but rather protected all nonmineral resources of affected land, and that the order neither regulated religious practices nor increased Native American influence over the land's management, and thus did not foster excessive government entanglement with religion.[6] Similarly, a ban on rock climbing by the United States Forest Service (USFS), at Cave Rock which was a site within the national forest and of religious significance to the Washoe Tribe, had the permissible secular purpose of cultural, historical, and archaeological preservation of a national monument, not the ostensible and predominant purpose of advancing the Washoe religion, pursuant to Establishment Clause requirements; the USFS's review under the National Environmental Policy Act determined that rock-climbing hardware adversely impacted the physical integrity of site and communication of the site's cultural significance.[7]

A city's refusal to abandon a dedicated public roadway in favor of a church which claimed that development of the road prevented the church from following the "will or calling of God" by preventing expansion of its facilities, did not, in and of itself, burden the church's rights under the Free Exercise Clause. Also, the city did not violate the Free Exercise Clause when it decided to develop rather than close the dedicated roadway located between two lots owned by a Christian church in order to provide access to a cemetery shelter operated by a "non-Christian religious" organization, inasmuch as the ultimate beneficiary of the development was the general public, and, even if the city had in the distant past closed roadways at the request of the organization, the church offered no evidence it was similarly situated to the organization.[8]

While the location of religious uses may be regulated in a proper case, the freedom of religion and other First Amendment rights rise above mere property rights and far above public inconvenience, annoyance, or unrest.[9] Zoning ordinances which exclude religious uses from all of the territory of a municipality are violative of the Establishment Clause or Free Exercise Clause.[10] However, a reasonable ordinance excluding religious uses from residential districts is not inconsistent with freedom of religion.[11] While a zoning municipality may reasonably restrict the placement of churches within residential neighborhoods, the requirement of a variance prior to the establishment of a church in a residential neighborhood is generally an impermissible interference with religious freedom.[12]

The fact that a landmark designation or a single-parcel historic district applies only to a house of worship does not in itself constitute a targeting of religion that offends the First Amendment.[13]

  

**Observation:**

The Religious Land Use and Institutionalized Persons Act (RLUIPA) provides that as a general rule, no government may impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest.[14] No government may impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution[15] or that discriminates against any assembly or institution on the basis of religion or religious denomination.[16] No government may impose or implement a land use regulation that totally excludes religious assemblies from a jurisdiction or unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.[17] The RLUIPA land use provisions have a secular purpose and are valid under the Establishment Clause; the principle or primary effect of the provisions neither advances nor inhibits religion, and the provisions do not foster an excessive government entanglement with religion.[18]



Footnotes

1 § 434.
2 Christ's Methodist Church v. Macklanburg, 1947 OK 63, 198 Okla. 297, 177 P.2d 1008 (1947).
3 Order of Friars Minor of Province of The Most Holy Name v. Denver Urban Renewal Authority, 186 Colo. 367, 527 P.2d 804 (1974).
4 Fortress Bible Church v. Feiner, 694 F.3d 208 (2d Cir. 2012).
5 Utah Gospel Mission v. Salt Lake City Corp., 425 F.3d 1249 (10th Cir. 2005).
6 Mount Royal Joint Venture v. Kempthorne, 477 F.3d 745 (D.C. Cir. 2007).
7 Access Fund v. U.S. Dept. of Agriculture, 499 F.3d 1036 (9th Cir. 2007).
8 Prater v. City of Burnside, Ky., 289 F.3d 417, 2002 FED App. 0162P (6th Cir. 2002).
9 Am. Jur. 2d, Zoning and Planning § 326.
10 Am. Jur. 2d, Zoning and Planning § 324.
11 Am. Jur. 2d, Zoning and Planning § 325.
12 Am. Jur. 2d, Zoning and Planning § 329.
13 Roman Catholic Bishop of Springfield v. City of Springfield, 724 F.3d 78 (1st Cir. 2013).
14 42 U.S.C.A. § 2000cc(a)(1).
15 42 U.S.C.A. § 2000cc(b)(1).
16 42 U.S.C.A. § 2000cc(b)(2).
17 42 U.S.C.A. § 2000cc(b)(3).
18 Westchester Day School v. Village of Mamaroneck, 504 F.3d 338, 226 Ed. Law Rep. 595 (2d Cir. 2007).

**End of Document**

# 16A Am. Jur. 2d Constitutional Law § 455

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**IX. Fundamental Constitutional Rights and Privileges**

**C. Particular Fundamental Constitutional Rights**

**1. First Amendment Rights Guaranteed by Constitution**

**b. Religious Freedom Guaranteed by Constitution**

**(4) Particular Applications of Religious Freedom under Constitution**

## § 455. Public office or employment subject to Religion Clauses of Constitution

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 1322, 1323

The United States Constitution expressly provides that no religious test shall ever be required as a qualification to any office or public trust under the United States.[1] While requiring public officers or employees to take certain types of loyalty oaths is unconstitutional on various grounds,[2] the requirement of an oath of office is not, in itself, unconstitutional.[3] The insistence of the state that any officer who was charged with the administration of justice should be required to take an oath to support the constitution of the state, which oath, according to the state's interpretation, included an indication of willingness to perform military service, does not violate principles of religious freedom.[4]

For purposes of a Free Exercise challenge, government employment policies and practices must be secular in nature, neutral toward religion, and generally applicable to avoid the requirement of justification by a compelling state interest.[5] The mere failure of a government employer to accommodate the religious needs of an employee, where the need for accommodation arises from a conflict with a neutral and generally applicable employment requirement, does not violate the First Amendment's Free Exercise Clause.[6] In contrast, coercive policies or practices in relation to support for or participation in religion violate the First Amendment protections, particularly when combined with conduct in the nature of punishment for noncompliance.[7] However, a police department's order that a police captain either attend or order subordinates to attend a law enforcement appreciation event hosted by an Islamic society did not place a burden on the officer's exercise of religious beliefs or practices, and thus did

  

not violate the officer's First Amendment right to the free exercise of religion, and the officer did not claim that ordering others to attend would violate the officer's religious beliefs.[8]

When a public employee or contractor's free exercise rights are a substantial or motivating factor in termination, the court evaluates the claim by balancing the First Amendment rights of the employee or contractor against the interests of the government as an employer, in promoting the efficiency of the public services it performs through its employees.[9] The termination of a state police officer for refusing on religious grounds to accept a casino assignment did not violate the Free Exercise Clause of the First Amendment, where the assignment was not made because of the officer's religiously based opposition to gambling, the state responded to the officer's deed of refusing to report for duty rather than to the officer's faith, and the officer was not treated more severely than had he refused the assignment for secular reasons.[10]

County social services department rules, restricting an employee from discussing religion with clients, displaying religious items in the employee's cubicle, and using a conference room for prayer meetings, did not violate the employee's free speech and free exercise rights under the First Amendment.[11]

The conduct of county sheriff, in inviting a religious organization comprised of law enforcement officers to speak at a department leadership conference and roll calls, constituted an endorsement of religion, in violation of the Establishment Clause, since the organization gave a heavily Christian-focused presentation at a mandatory conference for government employees, the sheriff subsequently invited them to present at mandatory roll calls during work hours, the sheriff granted them unfiltered access to a captive audience of subordinates, the organization was personally introduced by the sheriff's command staff and were permitted to distribute additional Christian-focused literature, and the sheriff refused to cease the presentations after some of the deputies complained.[12]



Footnotes

1 Am. Jur. 2d, Public Officers and Employees §§ 69, 124.
2 Am. Jur. 2d, Public Officers and Employees § 124.
3 Am. Jur. 2d, Public Officers and Employees § 121.
4 In re Summers, 325 U.S. 561, 65 S. Ct. 1307, 89 L. Ed. 1795 (1945).
5 Abdus-Shahid v. Mayor and City Council of Baltimore, 674 Fed. Appx. 267 (4th Cir. 2017).
6 Shrum v. City of Coweta, Okla., 449 F.3d 1132 (10th Cir. 2006).
7 Marrero-Mendez v. Calixto-Rodriguez, 830 F.3d 38 (1st Cir. 2016).
8 Fields v. City of Tulsa, 753 F.3d 1000 (10th Cir. 2014).
9 Walden v. Centers for Disease Control and Prevention, 669 F.3d 1277 (11th Cir. 2012).
10 Endres v. Indiana State Police, 349 F.3d 922 (7th Cir. 2003).
11 Berry v. Department of Social Services, 447 F.3d 642 (9th Cir. 2006).
12 Milwaukee Deputy Sheriffs' Ass'n v. Clarke, 588 F.3d 523 (7th Cir. 2009).

# 16A Am. Jur. 2d Constitutional Law § 456

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**IX. Fundamental Constitutional Rights and Privileges**

**C. Particular Fundamental Constitutional Rights**

**1. First Amendment Rights Guaranteed by Constitution**

**b. Religious Freedom Guaranteed by Constitution**

**(4) Particular Applications of Religious Freedom under Constitution**

## § 456. Sabbath or holiday observance subject to Religion Clauses of Constitution; Blue laws

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 1387, 1388

**A.L.R. Library**

Validity, construction, and effect of "Sunday closing" or "blue" laws—modern status, 10 A.L.R.4th 246

A State Sunday closing law does not violate the constitutional prohibition against laws respecting an establishment of religion where the present purpose and effect of the statute is not to aid religion but to set aside a day of rest and recreation; and this is true even where the origin of the statute is unquestionably religious in nature and purpose.[1] Sunday laws do not violate the First Amendment when they do not establish a church, make attendance at religious worship compulsory, impose restrictions on expression of religious belief, work a restriction on the exercise of religion according to the dictates of one's conscience, provide compulsory support of religious institutions by taxation or otherwise, or in any way enforce or prohibit religion,[2] including as applied to persons observing other days as the Sabbath.[3]

  

State recognition of a religious holiday as a legal holiday generally does not violate state or federal constitutional prohibitions regarding the establishment of religion, where there exists a secular justification for the recognition.[4]

A law prohibiting the sale of intoxicating liquor on Sunday does not violate the Establishment Clause.[5]



Footnotes

1 Braunfeld v. Brown, 366 U.S. 599, 81 S. Ct. 1144, 6 L. Ed. 2d 563 (1961), for additional opinion, see, 366 U.S. 420, 81 S. Ct. 1153, 6 L. Ed. 2d 393 (1961); McGowan v. State of Md., 366 U.S. 420, 81 S. Ct. 1101, 6 L. Ed. 2d 393 (1961), for additional opinion, see, 366 U.S. 420, 81 S. Ct. 1153, 6 L. Ed. 2d 393 (1961).

2 Am. Jur. 2d, Sundays and Holidays § 11.

3 Am. Jur. 2d, Sundays and Holidays § 12.

4 Am. Jur. 2d, Sundays and Holidays § 13.

5 Am. Jur. 2d, Intoxicating Liquors § 228.

# 16A Am. Jur. 2d Constitutional Law § 457

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**IX. Fundamental Constitutional Rights and Privileges**

**C. Particular Fundamental Constitutional Rights**

**1. First Amendment Rights Guaranteed by Constitution**

**b. Religious Freedom Guaranteed by Constitution**

**(4) Particular Applications of Religious Freedom under Constitution**

## § 457. Taxation subject to Religion Clauses of Constitution; exemptions

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 1385 to 1386(2)

Under the Establishment Clause of First Amendment, taxes cannot be levied in any amount to support any religious activities or institutions.[1] Although the presence or absence of compulsion is an important part of the analysis, the Establishment Clause prohibits the expenditure of government funds to aid in the establishment of religion even if the only coercion involved is in the collection of taxes to be used for that purpose.[2]

The Free Exercise Clause prevents the imposition of a tax on a religious organization only where a flat license tax operates as a prior restraint on the free exercise of religious beliefs.[3] It is not unconstitutional under the Free Exercise Clause for governments to levy taxes on "business" property owned or operated by religious organizations.[4]

The collection of tax revenues for expenditures that offend the religious beliefs of individual taxpayers does not violate the Free Exercise Clause of the First Amendment.[5] Even a substantial burden on free exercise rights is justified by broad public interest in maintaining sound tax system, free of myriad exceptions flowing from wide variety of religious beliefs.[6] Taxpayers have no constitutional right to withhold taxes based on moral or religious objections to government expenditures,[7] and may not opt out of paying general taxes under the Free Exercise Clause.[8] Moreover, the Free Exercise Clause not operate as a specific limitation

  

on the taxing and spending power of Congress.[9] The Free Exercise Clause is not violated by laws which tax the income derived by persons from their religious activities.[10]

The imposition of Social Security taxes is not unconstitutional as applied to persons who object on religious grounds to receipt of public insurance benefits and to payment of taxes to support public insurance funds.[11]

The Religion Clauses of the First Amendment are not violated by state granted property tax exemptions to religious organizations where the legislative purpose is not aimed at establishing, sponsoring, or supporting religion, and the effect of the exemptions is not an excessive government entanglement with religion.[12] The Free Exercise Clause does not preclude a state from eliminating altogether its exemption from taxation for religious publications in the absence of evidence that payment of the sales tax by subscribers to religious periodicals or purchases of religious books would offend religious beliefs or inhibit religious activity.[13]

The primary effect of the provision of the Internal Revenue Code governing charitable deductions—encouraging gifts to charitable entities, including but not limited to religious organizations—is neither to advance nor inhibit religion and, thus, does not violate the Establishment Clause of the First Amendment.[14] The disallowance of a religious contributions deduction for particular tax year did not violate taxpayers' First Amendment rights.[15] A requirement that taxpayers disclose the beneficiaries of charitable donations deducted from their gross income, although an indirect burden on the exercise of religion, does not make unlawful the practice of religion itself, and therefore is constitutional.[16]

Under the First Amendment, the Internal Revenue Service can reject otherwise valid claims of religious benefit for charitable deduction purposes only on the ground that the taxpayers' alleged beliefs are not sincerely held, not on the ground that such beliefs are inherently irreligious.[17] To sustain a claim that the Internal Revenue Service's revocation of a church's tax-exempt status violated the right to freely exercise its religion under First Amendment, the church must show that the revocation substantially burdened its free exercise right.[18]

The Establishment Clause was not violated by application of federal employment tax laws to a church; the normal incidents of collecting federal employment taxes do not involve intrusive government participation in supervision of or inquiry into religious affairs that is necessary to find excessive entanglement.[19]



Footnotes

1 Everson v. Board of Ed. of Ewing Tp., 330 U.S. 1, 67 S. Ct. 504, 91 L. Ed. 711, 168 A.L.R. 1392 (1947); Murdock v. Com. of Pennsylvania, 319 U.S. 105, 63 S. Ct. 870, 87 L. Ed. 1292, 146 A.L.R. 81 (1943).

2 DeStefano v. Emergency Housing Group, Inc., 247 F.3d 397 (2d Cir. 2001).

3 Jimmy Swaggart Ministries v. Board of Equalization of California, 493 U.S. 378, 110 S. Ct. 688, 107 L. Ed. 2d 796 (1990).

4 Gibbons v. District of Columbia, 116 U.S. 404, 6 S. Ct. 427, 29 L. Ed. 680 (1886).

5 Jenkins v. C.I.R., 483 F.3d 90 (2d Cir. 2007).
The burden, if any, placed on a taxpayer's freedom of religion by the requirement to pay federal income taxes supporting the military, despite moral and religious objections to the government expenditures, was justified by the government's interest in maintaining a sound and efficient tax system. Ruhaak v. C.I.R., 422 Fed. Appx. 530 (7th Cir. 2011).

6 Hernandez v. C.I.R., 490 U.S. 680, 109 S. Ct. 2136, 104 L. Ed. 2d 766 (1989).

7 Ruhaak v. C.I.R., 422 Fed. Appx. 530 (7th Cir. 2011).

8 Tarsney v. O'Keefe, 225 F.3d 929 (8th Cir. 2000).

9 Tarsney v. O'Keefe, 225 F.3d 929 (8th Cir. 2000).

10 Follett v. Town of McCormick, S.C., 321 U.S. 573, 64 S. Ct. 717, 88 L. Ed. 938, 152 A.L.R. 317 (1944); Murdock v. Com. of Pennsylvania, 319 U.S. 105, 63 S. Ct. 870, 87 L. Ed. 1292, 146 A.L.R. 81 (1943).

11 U.S. v. Lee, 455 U.S. 252, 102 S. Ct. 1051, 71 L. Ed. 2d 127 (1982); Hamner v. U.S., 476 Fed. Appx. 18 (5th Cir. 2012).

12 Am. Jur. 2d, State and Local Taxation § 213.

13 Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 109 S. Ct. 890, 103 L. Ed. 2d 1 (1989).

14 Hernandez v. C.I.R., 490 U.S. 680, 109 S. Ct. 2136, 104 L. Ed. 2d 766 (1989).

15 Carter v. U.S., 973 F.2d 1479 (9th Cir. 1992).

16 Hearde v. C. I. R., 421 F.2d 846 (9th Cir. 1970).

17 Hernandez v. C.I.R., 490 U.S. 680, 109 S. Ct. 2136, 104 L. Ed. 2d 766 (1989).

18 Branch Ministries v. Rossotti, 211 F.3d 137 (D.C. Cir. 2000).

19 U.S. v. Indianapolis Baptist Temple, 224 F.3d 627 (7th Cir. 2000).

**End of Document**

# 16A Am. Jur. 2d Constitutional Law § 458

**American Jurisprudence, Second Edition** | May 2021 Update

**Constitutional Law**

Barbara J. Van Arsdale, J.D.; James Buchwalter, J.D; Paul M. Coltoff, J.D.; John A. Gebauer, J.D.; Lonnie E. Griffith, Jr., J.D.; Janice Holben, J.D.; Sonja Larsen, J.D.; Lucas Martin, J.D.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Karl Oakes, J.D.; Karen L. Schultz, J.D.; Jeffrey J. Shampo, J.D.; and Kimberly C. Simmons, J.D.

**IX. Fundamental Constitutional Rights and Privileges**

**C. Particular Fundamental Constitutional Rights**

**1. First Amendment Rights Guaranteed by Constitution**

**c. Freedom of Speech and Press**

**(1) In General**

## § 458. Freedom of speech and press, generally; constitutional protection

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 1490, 1492 to 1494

The First Amendment to the United States Constitution and most state constitutions contain express prohibitions against the enactment of laws which would abridge the freedom of speech or of the press.[1] The rights to freedom of speech and freedom of the press, as guaranteed by the First Amendment, are fundamental constitutional rights,[2] and a party alleging violation of its First Amendment rights must show that the challenged government action actually regulates protected speech.[3]

The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits; the First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs,[4] and the Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it.[5] "Speech," as protected by the First Amendment, extends to many activities that are by their very nature nonverbal, but, whatever its source, there must be some outward manifestation of the allegedly protected First Amendment activity, since a defendant's assumptions and bad motives, standing alone, do not create First Amendment liability.[6]

  

Free speech is not restricted to compliments and members of a free society must be able to express candid opinions and make personal judgments; those opinions and judgments may be harsh or critical, even abusive, yet still do not subject the speaker or writer to civil liability for defamation.[7]

Ordinarily, governmental entities have some leeway to proscribe certain categories of speech among citizens to promote the efficient performance of governmental functions; there are certain governmental functions that cannot operate without some restrictions on particular kinds of speech.[8] However, the First Amendment does not permit the state to sacrifice speech for efficiency.[9]

**Observation:**

Illicit legislative intent is not the sine qua non of a violation of the First Amendment's free speech guarantee, and a party opposing the government need adduce no evidence of an improper censorial motive.[10]

It is established that the same fundamental principles which are contained in the First Amendment protect the rights there enumerated from any state abridgment by virtue of the Due Process Clause of the 14th Amendment. The rule is that the rights of freedom of speech and of the press are among the fundamental rights and liberties protected by the Due Process Clause of the 14th Amendment from impairment by state action,[11] and that any government action which chills constitutionally protected speech or expression contravenes the First Amendment.[12]

"Government" or "state" action includes a municipal ordinance adopted under state authority,[13] and state action accomplished solely by judicial act,[14] as where injunctive relief is sought against personal defamation.[15]

The First Amendment protects a person's right not only to advocate a cause but also to select what they believe to be the most effective means for so doing.[16] The First Amendment right to free speech does not guarantee an individual the most effective means of communication, only the means to communicate effectively.[17] Also, as a general principle, the First Amendment bars the government from dictating what individuals see or read or speak or hear, and a law imposing criminal penalties on protected speech is a stark example of speech suppression.[18]

The First and 14th Amendments require a measure of protection for advocating lawful means of vindicating legal rights, including advising another that his or her legal rights have been infringed.[19]

**Practice Tip:**

When the government restricts speech, the government bears the burden of proving the constitutionality of its actions.[20] The fact that a statute does not impose a complete prohibition on certain type of speech but instead imposes a burden on speech does not

  

affect the analysis of the statute under the First Amendment; the distinction between laws burdening and laws banning speech is but a matter of degree, and the government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans.[21]



Footnotes

1 Snyder v. Phelps, 562 U.S. 443, 131 S. Ct. 1207, 179 L. Ed. 2d 172 (2011) (the sensitivity and significance of the interests presented in clashes between First Amendment protection of speech and state-law rights counsel that courts rely on limited principles that sweep no more broadly than the appropriate context of the instant case); Mills v. State of Ala., 384 U.S. 214, 86 S. Ct. 1434, 16 L. Ed. 2d 484 (1966); Borden v. School Dist. of Tp. of East Brunswick, 523 F.3d 153, 231 Ed. Law Rep. 583 (3d Cir. 2008); Phillips v. DeWine, 92 F. Supp. 3d 702 (S.D. Ohio 2015), aff'd, 841 F.3d 405 (6th Cir. 2016); State v. Stummer, 219 Ariz. 137, 194 P.3d 1043 (2008) (the state constitution provides protection of speech independent of the First Amendment); Newell v. Runnels, 407 Md. 578, 967 A.2d 729 (2009); State v. Bailey, 166 N.H. 537, 100 A.3d 514 (2014); State v. Chepilko, 405 N.J. Super. 446, 965 A.2d 190 (App. Div. 2009).

2 Toffoloni v. LFP Publishing Group, LLC, 572 F.3d 1201 (11th Cir. 2009).

3 Cablevision Systems Corp. v. F.C.C., 570 F.3d 83 (2d Cir. 2009).

4 Brown v. Entertainment Merchants Ass'n, 564 U.S. 786, 131 S. Ct. 2729, 180 L. Ed. 2d 708 (2011).

5 U.S. v. Stevens, 559 U.S. 460, 130 S. Ct. 1577, 176 L. Ed. 2d 435 (2010).

6 Jordan v. Ector County, 516 F.3d 290 (5th Cir. 2008).
For discussion of protected symbolic and nonverbal speech, see §§ 528 to 533.

7 Madison v. Frazier, 539 F.3d 646 (7th Cir. 2008).

8 Siefert v. Alexander, 608 F.3d 974 (7th Cir. 2010).

9 National Institute of Family and Life Advocates v. Becerra, 138 S. Ct. 2361, 201 L. Ed. 2d 835 (2018); Arizona Free Enterprise Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 131 S. Ct. 2806, 180 L. Ed. 2d 664 (2011).

10 Reed v. Town of Gilbert, Ariz., 576 U.S. 155, 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015).

11 New York Times Co. v. Sullivan, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686, 95 A.L.R.2d 1412 (1964).
Generally, as to application of the First Amendment to the states through the 14th Amendment, see § 414.

12 Wolford v. Lasater, 78 F.3d 484 (10th Cir. 1996).

13 Times Film Corp. v. City of Chicago, 365 U.S. 43, 81 S. Ct. 391, 5 L. Ed. 2d 403 (1961); Talley v. California, 362 U.S. 60, 80 S. Ct. 536, 4 L. Ed. 2d 559 (1960).

14 A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Com. of Mass., 383 U.S. 413, 86 S. Ct. 975, 16 L. Ed. 2d 1 (1966); Brown v. State of La., 383 U.S. 131, 86 S. Ct. 719, 15 L. Ed. 2d 637 (1966).

15 Konigsberg v. Time, Inc., 288 F. Supp. 989 (S.D. N.Y. 1968); Greenberg v. De Salvo, 254 La. 1019, 229 So. 2d 83 (1969).

16 Citizens for Tax Reform v. Deters, 518 F.3d 375, 40 A.L.R.6th 693 (6th Cir. 2008).

17 Members of City Council of City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (1984); Showing Animals Respect & Kindness v. City of West Hollywood, 166 Cal. App. 4th 815, 83 Cal. Rptr. 3d 134 (2d Dist. 2008).

18 State v. Zidel, 156 N.H. 684, 940 A.2d 255 (2008).

19 Vinluan v. Doyle, 60 A.D.3d 237, 873 N.Y.S.2d 72 (2d Dep't 2009), as amended on other grounds, (July 21, 2009).

20 U.S. v. Playboy Entertainment Group, Inc., 529 U.S. 803, 120 S. Ct. 1878, 146 L. Ed. 2d 865 (2000).

21 U.S. v. Playboy Entertainment Group, Inc., 529 U.S. 803, 120 S. Ct. 1878, 146 L. Ed. 2d 865 (2000).

End of Document

**16A Am. Jur. 2d Constitutional Law § 459**

**American Jurisprudence, Second Edition** | May 2021 Update

**Constitutional Law**
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**IX. Fundamental Constitutional Rights and Privileges**

**C. Particular Fundamental Constitutional Rights**

**1. First Amendment Rights Guaranteed by Constitution**

**c. Freedom of Speech and Press**

**(1) In General**

# § 459. Constitutional protection of free speech as limited to government abridgment

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 1490, 1492 to 1494

As a general rule, the constitutional guarantee of free speech is a guarantee only against abridgment by the federal or state government[1] and not by private persons using their property nondiscriminatorily for private purposes only.[2] Indeed, purely private restrictions on the right of free speech are not prohibited in many instances where the First Amendment would forbid similar interference by the government.[3] The First Amendment, the terms of which apply only to governmental action, ordinarily does not itself throw into constitutional doubt decisions of private citizens to permit or to restrict speech, even where those decisions take place within the framework of a regulatory regime such as broadcasting.[4] Indeed, under the First Amendment's Free Speech Clause, the citizen is entitled to seek out or reject certain ideas or influences without government interference or control.[5]



Footnotes

1 Hudgens v. N. L. R. B., 424 U.S. 507, 96 S. Ct. 1029, 47 L. Ed. 2d 196 (1976).

2 Lloyd Corp., Limited v. Tanner, 407 U.S. 551, 92 S. Ct. 2219, 33 L. Ed. 2d 131 (1972).

3 Holodnak v. Avco Corp., Avco-Lycoming Div., Stratford, Connecticut, 514 F.2d 285 (2d Cir. 1975).

4 Denver Area Educational Telecommunications Consortium, Inc. v. F.C.C., 518 U.S. 727, 116 S. Ct. 2374, 135 L. Ed. 2d 888 (1996).

5 U.S. v. Playboy Entertainment Group, Inc., 529 U.S. 803, 120 S. Ct. 1878, 146 L. Ed. 2d 865 (2000).

End of Document

# 16A Am. Jur. 2d Constitutional Law § 460

**American Jurisprudence, Second Edition** | May 2021 Update

**Constitutional Law**
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**IX. Fundamental Constitutional Rights and Privileges**

**C. Particular Fundamental Constitutional Rights**

**1. First Amendment Rights Guaranteed by Constitution**

**c. Freedom of Speech and Press**

**(1) In General**

## § 460. Broad or liberal construction of constitutional right to freedom of speech and press

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 1490, 1523

The First Amendment does not speak equivocally but prohibits any law abridging the freedom of speech or of the press and is to be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow.[1] A broad conception of the First Amendment's guarantee of freedom of speech and of the press is necessary to supply the public need for information and education with respect to the significant issues of the times.[2] On the other hand, the free speech provisions of the First Amendment must be construed as part of a Constitution which creates a government for the purpose of performing several very important tasks, and the First Amendment should be interpreted so as not to cripple the regular work of the government.[3]

**Observation:**

The decisions of the United States Supreme Court in matters concerning free speech doctrine are entitled to respectful consideration in interpreting a state freedom of speech clause and ought to be followed unless persuasive reasons are presented for interpreting the state clause differently from the First Amendment.[4] Also, dissenting opinions and academic criticism of the United States Supreme

Court First Amendment precedent may be sources of persuasive reasons to interpret the state freedom of speech clause differently from the First Amendment.[5]



Footnotes

1 Pennekamp v. State of Fla., 328 U.S. 331, 66 S. Ct. 1029, 90 L. Ed. 1295 (1946).

2 Wood v. Georgia, 370 U.S. 375, 82 S. Ct. 1364, 8 L. Ed. 2d 569 (1962).

3 Columbia Broadcasting System, Inc. v. Democratic Nat. Committee, 412 U.S. 94, 93 S. Ct. 2080, 36 L. Ed. 2d 772 (1973).

4 Gallo Cattle Co. v. Kawamura, 159 Cal. App. 4th 948, 72 Cal. Rptr. 3d 1 (3d Dist. 2008).

5 Gallo Cattle Co. v. Kawamura, 159 Cal. App. 4th 948, 72 Cal. Rptr. 3d 1 (3d Dist. 2008).

**End of Document**

**16A Am. Jur. 2d Constitutional Law § 461**

**American Jurisprudence, Second Edition** | May 2021 Update

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# § 461. Purpose of constitutional guarantees of free speech and press

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 1491

The constitutional right of free expression is intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views can be voiced largely into the hands of each of us in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.[1] Free speech serves many ends, as it is essential to the democratic form of government, and it furthers the search for truth, and whenever the federal government or a state prevents individuals from saying what they think on important matters or compels them to voice ideas with which they disagree, it undermines these ends.[2] The safeguarding of the rights of free speech and of the press to the end that individuals may speak as they think on matters vital to them and that falsehoods may be exposed through the processes of education and discussion is essential to a free government.[3] The protections afforded by the First Amendment to freedom of speech and of the press are designed to assure an unfettered interchange of ideas for the bringing about of political and social changes desired by the people, and underlying such purpose is the belief that the best test of truth is the power of the thought to get itself accepted in the competition of the market.[4] At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence.[5] The constitutional right of free expression puts the decision as to what views can be voiced largely into the hands of each person in the hope that the use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which the political system

  

rests.[6] The freedom under the First Amendment to think as you will and to speak as you think is a means indispensable to the discovery and spread of political truth and is essential both to stable government and to political change.[7]

Because the effective functioning of a free government depends largely on the force of an informed public opinion and such informed understanding depends on the freedom the people have to applaud or criticize the way public employees do their jobs, the purpose of the right of free speech guaranteed to every person by the First Amendment to the Federal Constitution is to give to each citizen the right to criticize public persons and measures. A major purpose of the First Amendment is to protect the free discussion of governmental affairs,[8] including discussions about public officials[9] and candidates for public office,[10] and to foreclose public authorities from assuming a guardianship of the public mind through regulating the press, speech, and religion.[11] Indeed, the right to criticize public officials is clearly protected by the First Amendment.[12]

The safeguarding of free speech and a free press is a national constitutional policy,[13] and there is a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.[14] The purpose of the constitutional safeguard of the First Amendment is to encourage and nurture uninhibited, robust, and wide-open self-expression, particularly in matters of governing importance.[15]



Footnotes

1 Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd., 502 U.S. 105, 112 S. Ct. 501, 116 L. Ed. 2d 476 (1991).

2 Janus v. American Federation of State, County, and Mun. Employees, Council 31, 138 S. Ct. 2448, 201 L. Ed. 2d 924 (2018).

3 Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974).

4 Imperial Apparel, Ltd. v. Cosmo's Designer Direct, Inc., 227 Ill. 2d 381, 317 Ill. Dec. 855, 882 N.E.2d 1011 (2008).

5 Agency for Intern. Development v. Alliance for Open Society Intern., Inc., 570 U.S. 205, 133 S. Ct. 2321, 186 L. Ed. 2d 398 (2013).

6 McCutcheon v. Federal Election Com'n, 572 U.S. 185, 134 S. Ct. 1434, 188 L. Ed. 2d 468 (2014); Independent Newspapers, Inc. v. Brodie, 407 Md. 415, 966 A.2d 432 (2009).

7 Independent Newspapers, Inc. v. Brodie, 407 Md. 415, 966 A.2d 432 (2009).

8 Arizona Free Enterprise Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 131 S. Ct. 2806, 180 L. Ed. 2d 664 (2011); Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 98 S. Ct. 1535, 56 L. Ed. 2d 1 (1978).

9 Pell v. Procunier, 417 U.S. 817, 94 S. Ct. 2800, 41 L. Ed. 2d 495 (1974).

10 Arizona Free Enterprise Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 131 S. Ct. 2806, 180 L. Ed. 2d 664 (2011); Munro v. Socialist Workers Party, 479 U.S. 189, 107 S. Ct. 533, 93 L. Ed. 2d 499 (1986).

11 Cohen v. California, 403 U.S. 15, 91 S. Ct. 1780, 29 L. Ed. 2d 284 (1971).

12 Jenkins v. Rock Hill Local School Dist., 513 F.3d 580, 229 Ed. Law Rep. 40 (6th Cir. 2008).

13 New York Times Co. v. Sullivan, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686, 95 A.L.R.2d 1412 (1964).

14 Watts v. U.S., 394 U.S. 705, 89 S. Ct. 1399, 22 L. Ed. 2d 664 (1969).

15 Lehman v. City of Shaker Heights, 418 U.S. 298, 94 S. Ct. 2714, 41 L. Ed. 2d 770 (1974).

**16A Am. Jur. 2d Constitutional Law § 462**

**American Jurisprudence, Second Edition** | May 2021 Update

**Constitutional Law**
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**IX. Fundamental Constitutional Rights and Privileges**

**C. Particular Fundamental Constitutional Rights**

**1. First Amendment Rights Guaranteed by Constitution**

**c. Freedom of Speech and Press**

**(1) In General**

# § 462. Nature and principal function of constitutional guarantees of free speech and press

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 1490, 1498

The nature and principal function of free speech under our system of government is to invite dispute, and it may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.[1] The freedom of speech and of the press are fundamental personal rights and liberties, the exercise of which lies at the foundation of free government by free people.[2] It is only through free debate and free exchange of ideas that the government remains responsive to the will of the people and peaceful change is effected.[3] The right to speak freely has been fashioned to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people.[4] The right to free speech is a fundamental personal right and essential to the common quest for truth and the vitality of society as a whole.[5]

The constitutional guarantees of freedom of speech and of the press are not for the benefit of the press so much as for the benefit of all the people; the broadly defined freedom of the press assures the maintenance of the American political system and an open society.[6] Freedom of the press is not a private property right but is a personal right of each citizen to be informed about current events on a timely basis.[7]

In its broadest sense, the phrase "freedom of the press" includes not only exemption from censorship[8] but also security against laws enacted by the legislative department of the government or measures resorted to by either of the other branches for the

  

purpose of stifling just criticism or muzzling public opinion.[9] The Government may not penalize an individual for robustly exercising his First Amendment rights.[10] Such freedoms are constitutionally protected not only against heavy-handed frontal attack but also from being stifled by a more subtle governmental interference.[11] Above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.[12] Also, the First Amendment does not permit the government to restrict the speech of some elements of society in order to enhance the relative voice of others.[13] The First Amendment creates an open marketplace in which differing ideas about political, economic, and social issues can compete freely for public acceptance without improper government interference.[14] The First Amendment creates a preserve where the views and beliefs of the individual are made inviolate and gives freedom of the mind the same security as freedom of conscience.[15] At the heart of the First Amendment is the notion that an individual should be free to believe as he or she will, and that in a free society, one's beliefs should be shaped by his or her mind and conscience rather than coerced by the state; freedom of belief is no incidental or secondary aspect of the First Amendment's protections.[16]



Footnotes

1 Texas v. Johnson, 491 U.S. 397, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989).

2 Marsh v. State of Ala., 326 U.S. 501, 66 S. Ct. 276, 90 L. Ed. 265 (1946).

3 Greenbelt Co-op. Pub. Ass'n v. Bresler, 398 U.S. 6, 90 S. Ct. 1537, 26 L. Ed. 2d 6 (1970).

4 Buckley v. Valeo, 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976); Miller v. California, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973).

5 St. James Healthcare v. Cole, 2008 MT 44, 341 Mont. 368, 178 P.3d 696 (2008).

6 Time, Inc. v. Hill, 385 U.S. 374, 87 S. Ct. 534, 17 L. Ed. 2d 456 (1967).

7 State ex rel. Miami Herald Pub. Co. v. McIntosh, 340 So. 2d 904 (Fla. 1976).

8 § 475.

9 Giragi v. Moore, 48 Ariz. 33, 58 P.2d 1249, 110 A.L.R. 314 (1936), on reh'g, 49 Ariz. 74, 64 P.2d 819, 110 A.L.R. 320 (1937).

10 McCutcheon v. Federal Election Com'n, 572 U.S. 185, 134 S. Ct. 1434, 188 L. Ed. 2d 468 (2014).

11 Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539, 83 S. Ct. 889, 9 L. Ed. 2d 929 (1963).

12 Parkhouse v. Stringer, 55 A.D.3d 1, 863 N.Y.S.2d 400 (1st Dep't 2008), order aff'd, 12 N.Y.3d 660, 884 N.Y.S.2d 216, 912 N.E.2d 48 (2009).
Generally, as to the contents of utterances, see §§ 458 to 526.

13 Buckley v. Valeo, 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976).

14 Knox v. Service Employees Intern. Union, Local 1000, 567 U.S. 298, 132 S. Ct. 2277, 183 L. Ed. 2d 281 (2012).

15 Baird v. State Bar of Ariz., 401 U.S. 1, 91 S. Ct. 702, 27 L. Ed. 2d 639 (1971).

16 Abood v. Detroit Bd. of Ed., 431 U.S. 209, 97 S. Ct. 1782, 52 L. Ed. 2d 261 (1977) (overruled on other grounds by, Janus v. American Federation of State, County, and Mun. Employees, Council 31, 138 S. Ct. 2448, 201 L. Ed. 2d 924 (2018)).

End of Document

# 16A Am. Jur. 2d Constitutional Law § 463

**American Jurisprudence, Second Edition** | May 2021 Update

**Constitutional Law**
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**IX. Fundamental Constitutional Rights and Privileges**

**C. Particular Fundamental Constitutional Rights**

**1. First Amendment Rights Guaranteed by Constitution**

**c. Freedom of Speech and Press**

**(1) In General**

## § 463. Conflict of constitutional right to free speech and press with right of privacy

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 1490, 1556

The rights guaranteed by the First Amendment do not require total abrogation of the right to privacy,[1] inasmuch as there is no constitutional right to force speech into the home of an unwilling listener.[2] Accordingly, a state bar's interest in protecting the privacy and tranquility of personal injury victims and their loved ones against intrusive, unsolicited contact by lawyers has been deemed a substantial interest for purposes of a *Central Hudson*[3] intermediate scrutiny[4] of state bar rules which prohibited lawyers from sending targeted direct-mail solicitations to victims and their relatives for 30 days following an accident or disaster or accepting referrals obtained in violation of that prohibition.[5]

Despite the constitutional guarantee of freedom of expression, the government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue.[6] Nothing in the United States Constitution compels persons to listen to or view any unwanted communication, whatever its merit, and no one has a right to press even "good" ideas on an unwilling recipient. A statute authorizing a householder to require that his or her name be removed from the mailing list of a mailer of pandering advertisements and that all future mailings to the householder should cease does not violate the First Amendment. A mailer's right to communicate must stop at the mailbox of an unreceptive addressee.[7] On the other hand, the ability of government to shut off discourse solely to protect others from hearing it is dependent on a showing that substantial privacy interests are being invaded in an essentially intolerable manner.[8] While

  

a state or municipality may protect individual privacy by enacting reasonable time, place, and manner regulations applicable to all speech irrespective of content, nevertheless when the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its powers. Selective restrictions are valid only when the speaker intrudes on the privacy of the home, or the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure.[9]

The mere presumed presence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense.[10] The determination of issues pitting the First Amendment rights of speakers against the privacy rights of those who may be unwilling viewers or auditors demands delicate balancing because, in the sphere of collision between claims of privacy and those of free speech, the interests on both sides are plainly rooted in the traditions and significant concerns of the American society.[11]



Footnotes

1 Briscoe v. Reader's Digest Association, Inc., 4 Cal. 3d 529, 93 Cal. Rptr. 866, 483 P.2d 34, 57 A.L.R.3d 1 (1971) (overruled on other grounds by, Gates v. Discovery Communications, Inc., 34 Cal. 4th 679, 21 Cal. Rptr. 3d 663, 101 P.3d 552 (2004)).
Generally, as to the constitutional right of privacy, see §§ 648 to 656.

2 Frisby v. Schultz, 487 U.S. 474, 108 S. Ct. 2495, 101 L. Ed. 2d 420 (1988).
As to regulation of private speech, generally, see § 467.

3 Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York, 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980).

4 As to "intermediate scrutiny" under the *Central Hudson* holding, see § 500.

5 Florida Bar v. Went For It, Inc., 515 U.S. 618, 115 S. Ct. 2371, 132 L. Ed. 2d 541 (1995); Revo v. Disciplinary Bd. of the Supreme Court for the State of N.M., 106 F.3d 929 (10th Cir. 1997).

6 Cohen v. California, 403 U.S. 15, 91 S. Ct. 1780, 29 L. Ed. 2d 284 (1971).

7 Rowan v. U.S. Post Office Dept., 397 U.S. 728, 90 S. Ct. 1484, 25 L. Ed. 2d 736 (1970).

8 Snyder v. Phelps, 562 U.S. 443, 131 S. Ct. 1207, 179 L. Ed. 2d 172 (2011); Erznoznik v. City of Jacksonville, 422 U.S. 205, 95 S. Ct. 2268, 45 L. Ed. 2d 125 (1975); Bigelow v. Virginia, 421 U.S. 809, 95 S. Ct. 2222, 44 L. Ed. 2d 600 (1975).

9 Erznoznik v. City of Jacksonville, 422 U.S. 205, 95 S. Ct. 2268, 45 L. Ed. 2d 125 (1975).
Generally, as to the regulation of the manner, place, or time of an utterance or dissemination, see § 534.

10 Cohen v. California, 403 U.S. 15, 91 S. Ct. 1780, 29 L. Ed. 2d 284 (1971).

11 Erznoznik v. City of Jacksonville, 422 U.S. 205, 95 S. Ct. 2268, 45 L. Ed. 2d 125 (1975); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1975).

**End of Document**

# 16A Am. Jur. 2d Constitutional Law § 464

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**IX. Fundamental Constitutional Rights and Privileges**

**C. Particular Fundamental Constitutional Rights**

**1. First Amendment Rights Guaranteed by Constitution**

**c. Freedom of Speech and Press**

**(2) Scope of Constitutional Guarantees of Free Speech and Press**

**(a) In General**

## § 464. Scope of constitutional guarantee of free speech and press, generally

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 855, 1490, 1545

**A.L.R. Library**

First Amendment Protection Afforded to Web Site Operators, 30 A.L.R.6th 299
Validity, Construction, and Application of Campaign Finance Laws—Supreme Court Cases, 19 A.L.R. Fed. 2d 1

If there is a bedrock principle underlying the scope of the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.[1] In public debate, insulting and even outrageous speech must be tolerated, in order to provide adequate breathing space to the freedoms protected by the First Amendment.[2] Freedom of speech and of the press rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.[3]

  

The underlying safeguard of the constitutional provision for freedom of the press or of speech is "that opinion is free and conduct alone is amenable to the law."[4] However, to be sufficiently imbued with communicative elements warranting constitutional protection under the Free Speech Clause, an activity need not necessarily embody a narrow, succinctly articulable message, but the reviewing court must find, at the very least, an intent to convey a particularized message along with a great likelihood that the message will be understood by those viewing it.[5] As long as the means are peaceful, the communication need not meet standards of acceptability in order to be protected by the constitutional guarantee of freedom of expression,[6] since the government may not regulate speech based on its substantive content or the message it conveys, nor may it, in the realm of private speech or expression, favor one speaker over another, inasmuch as any discrimination against speech because of its message is presumed to be unconstitutional.[7] The First Amendment generally prevents the government from proscribing speech or even expressive conduct because of its disapproval of the ideas being expressed.[8] Indeed, as a general matter, the First Amendment means that the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content; however, this principle, like other First Amendment principles, is not absolute.[9] The First Amendment generally prohibits the government from enacting laws that abridge the freedom of speech because of disapproval of its content.[10] While the government may, consistently with the First Amendment, advocate in favor of its own policies, it may not suppress opposing views.[11]

The First Amendment recognizes that a certain amount of expressive disorder not only is inevitable in a society committed to individual freedom but also must itself be protected if that freedom would survive.[12] However, the right of free speech does not encompass the right to cause disruption, and that is particularly true when those claiming the protection of the First Amendment cause actual disruption of an event covered by a permit.[13] Moreover, the First Amendment does not protect conduct that intentionally obstructs government operations.[14] Also, the First Amendment does not protect illegal conduct implemented through trade associations.[15]

Under the First Amendment, the public has a right to every individual's views and every person has the right to speak them,[16] without regard to whether the persons involved are famous or anonymous.[17] The First Amendment's basic guarantee is that of freedom to advocate ideas,[18] and the freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the freedom of speech.[19] Moreover, the rights of free speech and free press, although not identical, are inseparably connected with the rights to assemble peaceably and to petition for a redress of grievances, all of which rights are among the most precious of the liberties safeguarded by the Bill of Rights.[20]

The statutory prohibition against providing material support or resources to a foreign terrorist organization does not violate the First Amendment's guarantees of freedom of speech and association, since the statute controls conduct rather than communication.[21]

**Practice Tip:**

The general rule that the plaintiff must assert his or her own legal rights and interests and cannot rest his or her claim to relief on the legal rights or interests of third parties is relaxed in the First Amendment context; when there is a danger of chilling free speech, society's interest in having a statute challenged may outweigh prudential considerations that normally counsel against third-party standing.[22]

  

Footnotes

1 Snyder v. Phelps, 562 U.S. 443, 131 S. Ct. 1207, 179 L. Ed. 2d 172 (2011); Texas v. Johnson, 491 U.S. 397, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989).

2 Snyder v. Phelps, 562 U.S. 443, 131 S. Ct. 1207, 179 L. Ed. 2d 172 (2011).

3 Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 89 S. Ct. 1794, 23 L. Ed. 2d 371 (1969).

4 Watts v. U.S., 394 U.S. 705, 89 S. Ct. 1399, 22 L. Ed. 2d 664 (1969).

5 Zalewska v. County of Sullivan, New York, 316 F.3d 314 (2d Cir. 2003).
The government's compilation of the speech of third parties is a communicative act for purposes of First Amendment analysis. People for the Ethical Treatment of Animals, Inc. v. Gittens, 414 F.3d 23 (D.C. Cir. 2005).

6 Cohen v. California, 403 U.S. 15, 91 S. Ct. 1780, 29 L. Ed. 2d 284 (1971).

7 Rosenberger v. Rector and Visitors of University of Virginia, 515 U.S. 819, 115 S. Ct. 2510, 132 L. Ed. 2d 700, 101 Ed. Law Rep. 552 (1995).

8 R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992).

9 Ashcroft v. American Civil Liberties Union, 535 U.S. 564, 122 S. Ct. 1700, 152 L. Ed. 2d 771 (2002).

10 Rodriguez v. State, 906 So. 2d 1082 (Fla. 3d DCA 2004), decision aff'd, 920 So. 2d 624 (Fla. 2005).

11 Page v. Lexington County School Dist. One, 531 F.3d 275, 234 Ed. Law Rep. 538 (4th Cir. 2008).
As to the regulation of government speech, see § 487.

12 City of Houston, Tex. v. Hill, 482 U.S. 451, 107 S. Ct. 2502, 96 L. Ed. 2d 398 (1987).

13 Startzell v. City of Philadelphia, Pennsylvania, 533 F.3d 183 (3d Cir. 2008).
As to limits on the freedom of speech, generally, see §§ 513 to 517.

14 U.S. v. Twinn, 369 F. Supp. 2d 721 (E.D. Va. 2005) (holding that a defendant's statements pointing out an undercover police officer to other men in a national park are not protected speech under the First Amendment, where the defendant was aware that the officer was conducting undercover police work and specifically intended to undermine the officer's police duties).

15 In re Managed Care Litigation, 298 F. Supp. 2d 1259 (S.D. Fla. 2003).

16 American Communications Ass'n, C.I.O., v. Douds, 339 U.S. 382, 70 S. Ct. 674, 94 L. Ed. 925 (1950).

17 McIntyre v. Ohio Elections Com'n, 514 U.S. 334, 115 S. Ct. 1511, 131 L. Ed. 2d 426 (1995).

18 Kingsley Intern. Pictures Corp. v. Regents of University of State of N.Y., 360 U.S. 684, 79 S. Ct. 1362, 3 L. Ed. 2d 1512 (1959); 1621, Inc. v. Wilson, 402 Pa. 94, 166 A.2d 271, 93 A.L.R.2d 1274 (1960).

19 Griswold v. Connecticut, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965).
As to freedom of association, generally, see § 578.

20 United Mine Workers of America, Dist. 12 v. Illinois State Bar Ass'n, 389 U.S. 217, 88 S. Ct. 353, 19 L. Ed. 2d 426 (1967).
As to rights of assembly and petition, generally, see § 554.

21 People's Mojahedin Organization of Iran v. Department of State, 327 F.3d 1238 (D.C. Cir. 2003).

22 Mothershed v. Justices of Supreme Court, 410 F.3d 602 (9th Cir. 2005), as amended on other grounds on denial of reh'g, (July 21, 2005) and opinion amended on other grounds on denial of reh'g, 2005 WL 1692466 (9th Cir. 2005).

End of Document

# 16A Am. Jur. 2d Constitutional Law § 465

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**IX. Fundamental Constitutional Rights and Privileges**

**C. Particular Fundamental Constitutional Rights**

**1. First Amendment Rights Guaranteed by Constitution**

**c. Freedom of Speech and Press**

**(2) Scope of Constitutional Guarantees of Free Speech and Press**

**(a) In General**

## § 465. Subject of speech protected

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 1490, 1492, 1545, 1550, 1579

Speech by citizens on matters of public concern lies at the heart of the First Amendment, which was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.[1] The First Amendment creates a forum in which all may seek, without hindrance or aid from the state, to move public opinion and achieve their political goals.[2] Speech is protected even when the subject or manner of expression is uncomfortable.[3] The right to free speech allows for an uninhibited, robust, and wide-open discussion of public issues that may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.[4] Moreover, the First Amendment denies a state the power to prohibit dissemination of social, economic, and political doctrine which a vast majority of its citizens believe to be false and fraught with evil consequence.[5] Humor is a protected form of free speech, just as much to be given full scope, under appropriate circumstances, as the political speech, the journalistic expose, or the religious tract.[6] Rhetorical hyperbole and expressions of opinion not asserting actual or provable facts are protected speech.[7]

The right to freedom of speech and of the press under the First and 14th Amendments is as extensive with respect to discussion related to matters of local concern as to matters of federal concern; it protects speech and assembly regarding secular as well as

  

political causes,[8] and the rights of free speech and free press protected thereby are not confined to any particular field of human interest.[9] These rights extend to myriad matters of public interest or concern,[10] embracing all issues about which information is needed or appropriate to enable members of society to cope with the exigencies of their period.[11] The First Amendment assures the broadest colorable exercise of free speech and free press for religious, political, economic, scientific, news, or informational ends,[12] inasmuch as the Constitution's basic guarantee of freedom to advocate ideas is not confined to the expression of ideas which are conventional or shared by a majority.[13] Freedom of speech is of paramount importance and may not be denied merely because it may create dispute.[14] Hence, the dissemination of various views may not be suppressed because they are unpopular, extreme, or controversial;[15] distasteful,[16] defiant, or contemptuous;[17] offensive to some hearers or viewers;[18] or foolish and irresponsible.[19] This is so, irrespective of the truth of the utterances.[20] For example, speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful, but the proudest boast of the Supreme Court's free speech jurisprudence is that it protects the freedom to express hated thoughts.[21] However, unwanted speech that threatens, alarms, harasses, or annoys an individual may be proscribed without violating the speaker's right to free expression.[22] The guarantee of the First Amendment protects expression which is eloquent no less than that which is unconvincing.[23] In the realm of protected speech, a state legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue.[24] The government may not prohibit the dissemination of ideas that it disfavors, nor compel the endorsement of ideas that it approves.[25] Consistent with this, the state may not burden the speech of others in order to tilt public debate in a preferred direction.[26] Indeed, laws designed or intended to suppress or restrict the expression of specific speakers contradict basic First Amendment principles.[27]

The constitutional protection is not limited to the exposition of ideas,[28] and the protection afforded to free speech extends to speech or publications which are entertaining as well as to those which are instructive or informative.[29]

Under the First Amendment free speech clause, once the government has chosen to permit discussion of certain subject matters, it may not then silence speakers who address those subject matters from a particular perspective.[30]

The First Amendment right to obtain legal advice does not depend on the purpose for which the advice is sought, and the First Amendment protects the right of an individual or group to consult with an attorney on any legal matter.[31] This right applies equally to legal representation intended to advocate a political or social belief or to recover damages in a personal injury suit.[32]

The filing of an Equal Employment Opportunity Commission (EEOC) complaint constitutes protected speech.[33]



Footnotes

1 Lane v. Franks, 573 U.S. 228, 134 S. Ct. 2369, 189 L. Ed. 2d 312 (2014); Dublirer v. 2000 Linwood Ave. Owners, Inc., 220 N.J. 71, 103 A.3d 249 (2014).

2 Knox v. Service Employees Intern. Union, Local 1000, 567 U.S. 298, 132 S. Ct. 2277, 183 L. Ed. 2d 281 (2012).

3 Operation Rescue-National v. Planned Parenthood of Houston and Southeast Texas, Inc., 975 S.W.2d 546 (Tex. 1998).

4 G.D. v. Kenny, 205 N.J. 275, 15 A.3d 300 (2011).

5 Rodriguez v. State, 906 So. 2d 1082 (Fla. 3d DCA 2004), decision aff'd, 920 So. 2d 624 (Fla. 2005).

6 New Times, Inc. v. Isaacks, 146 S.W.3d 144 (Tex. 2004) (stating that the First Amendment does not police bad taste).

7 Iowa Supreme Court Attorney Disciplinary Bd. v. Weaver, 750 N.W.2d 71 (Iowa 2008); Craven v. Cope, 188 N.C. App. 814, 656 S.E.2d 729 (2008).

8 United Mine Workers of America, Dist. 12 v. Illinois State Bar Ass'n, 389 U.S. 217, 88 S. Ct. 353, 19 L. Ed. 2d 426 (1967).

9 United Mine Workers of America, Dist. 12 v. Illinois State Bar Ass'n, 389 U.S. 217, 88 S. Ct. 353, 19 L. Ed. 2d 426 (1967).

10 First Nat. Bank of Boston v. Bellotti, 435 U.S. 765, 98 S. Ct. 1407, 55 L. Ed. 2d 707 (1978).

11 First Nat. Bank of Boston v. Bellotti, 435 U.S. 765, 98 S. Ct. 1407, 55 L. Ed. 2d 707 (1978).

12 Douglas v. City of Jeannette (Pennsylvania), 319 U.S. 157, 63 S. Ct. 877, 87 L. Ed. 1324 (1943).

13 Kingsley Intern. Pictures Corp. v. Regents of University of State of N.Y., 360 U.S. 684, 79 S. Ct. 1362, 3 L. Ed. 2d 1512 (1959).

14 Ashton v. Kentucky, 384 U.S. 195, 86 S. Ct. 1407, 16 L. Ed. 2d 469 (1966).

15 Whitehill v. Elkins, 389 U.S. 54, 88 S. Ct. 184, 19 L. Ed. 2d 228 (1967).

16 Monitor Patriot Co. v. Roy, 401 U.S. 265, 91 S. Ct. 621, 28 L. Ed. 2d 35 (1971) (under the freedom of speech and of the press, protection is afforded even to opinions that are loathed).

17 Street v. New York, 394 U.S. 576, 89 S. Ct. 1354, 22 L. Ed. 2d 572 (1969).

18 Matal v. Tam, 137 S. Ct. 1744, 198 L. Ed. 2d 366 (2017); Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd., 502 U.S. 105, 112 S. Ct. 501, 116 L. Ed. 2d 476 (1991).

19 Cohen v. California, 403 U.S. 15, 91 S. Ct. 1780, 29 L. Ed. 2d 284 (1971).

20 Branzburg v. Hayes, 408 U.S. 665, 92 S. Ct. 2646, 33 L. Ed. 2d 626 (1972).

21 Matal v. Tam, 137 S. Ct. 1744, 198 L. Ed. 2d 366 (2017).

22 People v. Limage, 19 Misc. 3d 395, 851 N.Y.S.2d 852 (N.Y. City Crim. Ct. 2008).

23 Kingsley Intern. Pictures Corp. v. Regents of University of State of N.Y., 360 U.S. 684, 79 S. Ct. 1362, 3 L. Ed. 2d 1512 (1959).

24 First Nat. Bank of Boston v. Bellotti, 435 U.S. 765, 98 S. Ct. 1407, 55 L. Ed. 2d 707 (1978).

25 Harris v. Quinn, 573 U.S. 616, 134 S. Ct. 2618, 189 L. Ed. 2d 620 (2014); Knox v. Service Employees Intern. Union, Local 1000, 567 U.S. 298, 132 S. Ct. 2277, 183 L. Ed. 2d 281 (2012).

26 Sorrell v. IMS Health Inc., 564 U.S. 552, 131 S. Ct. 2653, 180 L. Ed. 2d 544, 67 A.L.R.6th 755 (2011).

27 U.S. v. Playboy Entertainment Group, Inc., 529 U.S. 803, 120 S. Ct. 1878, 146 L. Ed. 2d 865 (2000).

28 Winters v. New York, 333 U.S. 507, 68 S. Ct. 665, 92 L. Ed. 840 (1948).

29 Weaver v. Jordan, 64 Cal. 2d 235, 49 Cal. Rptr. 537, 411 P.2d 289 (1966).

30 Arizona Life Coalition Inc. v. Stanton, 515 F.3d 956 (9th Cir. 2008).

31 American Civil Liberties Union Fund of Michigan v. Livingston County, 23 F. Supp. 3d 834 (E.D. Mich. 2014), stay pending appeal denied, 2014 WL 12662064 (E.D. Mich. 2014) and aff'd, 796 F.3d 636 (6th Cir. 2015).

32 Denius v. Dunlap, 209 F.3d 944, 143 Ed. Law Rep. 736 (7th Cir. 2000).

33 Jones v. City of Wilmington, 299 F. Supp. 2d 380 (D. Del. 2004).

End of Document

# 16A Am. Jur. 2d Constitutional Law § 466

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**IX. Fundamental Constitutional Rights and Privileges**

**C. Particular Fundamental Constitutional Rights**

**1. First Amendment Rights Guaranteed by Constitution**

**c. Freedom of Speech and Press**

**(2) Scope of Constitutional Guarantees of Free Speech and Press**

**(a) In General**

## § 466. Medium of speech protected

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 1490, 1492, 1545, 1550, 1579

For purposes of First Amendment analysis, the Constitution protects more than written or spoken words as media of expression and instead includes pictures, films, paintings, drawings, and engravings, as well as music, theater, and DVD recordings.[1] Whatever the challenges of applying the Constitution to ever-advancing technology, basic principles of freedom of speech and press, like the First Amendment's command, do not vary when new and different medium for communication appears.[2]



Footnotes

1 T.V. ex rel. B.V. v. Smith-Green Community School Corp., 807 F. Supp. 2d 767, 275 Ed. Law Rep. 826 (N.D. Ind. 2011); People v. Chen Lee, 19 Misc. 3d 791, 860 N.Y.S.2d 845 (N.Y. City Crim. Ct. 2008).

2 Brown v. Entertainment Merchants Ass'n, 564 U.S. 786, 131 S. Ct. 2729, 180 L. Ed. 2d 708 (2011).

**End of Document**

# 16A Am. Jur. 2d Constitutional Law § 467

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**IX. Fundamental Constitutional Rights and Privileges**

**C. Particular Fundamental Constitutional Rights**

**1. First Amendment Rights Guaranteed by Constitution**

**c. Freedom of Speech and Press**

**(2) Scope of Constitutional Guarantees of Free Speech and Press**

**(a) In General**

## § 467. First Amendment protection of private speech

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 1490, 1492, 1545, 1550, 1579

Not all speech is of equal First Amendment importance, and where matters of purely private significance are at issue, First Amendment protections are often less rigorous, because restricting speech on purely private matters does not implicate the same constitutional concerns as limiting speech on matters of public interest; there is no threat to the free and robust debate of public issues, there is no potential interference with a meaningful dialogue of ideas, and the threat of liability does not pose the risk of a reaction of self-censorship on matters of public import.[1] However, when a unit of government creates a limited public forum for private speech, in either a literal or metaphysical sense, some content-based and speaker-based restrictions may be allowed, but even in such cases, viewpoint discrimination is forbidden.[2]



Footnotes

1 Snyder v. Phelps, 562 U.S. 443, 131 S. Ct. 1207, 179 L. Ed. 2d 172 (2011).

2 Matal v. Tam, 137 S. Ct. 1744, 198 L. Ed. 2d 366 (2017).

End of Document

# 16A Am. Jur. 2d Constitutional Law § 468

**American Jurisprudence, Second Edition** | May 2021 Update

**Constitutional Law**
Barbara J. Van Arsdale, J.D.; James Buchwalter, J.D; Paul M. Coltoff, J.D.; John A. Gebauer, J.D.; Lonnie E. Griffith, Jr., J.D.; Janice Holben, J.D.; Sonja Larsen, J.D.; Lucas Martin, J.D.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Karl Oakes, J.D.; Karen L. Schultz, J.D.; Jeffrey J. Shampo, J.D.; and Kimberly C. Simmons, J.D.

**IX. Fundamental Constitutional Rights and Privileges**

**C. Particular Fundamental Constitutional Rights**

**1. First Amendment Rights Guaranteed by Constitution**

**c. Freedom of Speech and Press**

**(2) Scope of Constitutional Guarantees of Free Speech and Press**

**(a) In General**

## § 468. Regulations based on speaker's viewpoint or content of speech

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 1507, 1516 to 1518

When enforcing the First Amendment's prohibition of laws that abridge the freedom of speech, the court distinguishes between "content-based regulations," which target speech based on its communicative content, and content-neutral regulations of speech.[1] Government regulation of speech is "content based," and presumptively unconstitutional,[2] if a law applies to particular speech because of the topic discussed or the idea or message expressed, and this commonsense meaning of the phrase "content based" requires a court to consider whether a regulation of speech on its face draws distinctions based on the message a speaker conveys.[3]

A constitutionally permissible time, place, or manner restriction on speech may not be based on either the content or the subject matter of the speech[4] because the vagueness of a content-based regulation of speech raises special First Amendment concerns in view of its obvious chilling effect on free speech.[5] The First Amendment prohibits the government from discriminating based on a viewpoint that the speaker seeks to express,[6] regardless of the nature of the forum.[7] "Viewpoint discrimination" is an egregious form of content discrimination,[8] and, therefore, the government must abstain from regulating speech when a specific motivating ideology or opinion or perspective of the speaker is the rationale for the restriction.[9] Viewpoint discrimination is

  

censorship in its purest form and government regulation that discriminates among viewpoints threatens the continued vitality of free speech;[10] viewpoint-based restrictions violate the First Amendment regardless of whether they also serve some valid time, place, and manner interest.[11]

When the government seeks to restrict speech based on its content, the usual presumption of constitutionality afforded congressional enactments is reversed; content-based regulations are presumptively invalid under the First Amendment,[12] and the government bears the burden of rebutting that presumption.[13] The rationale of the general prohibition against content-based regulations of speech is that content discrimination raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace.[14]

**Observation:**

When someone challenges a law as viewpoint discriminatory but it is not clear from the face of the law which speakers will be allowed to speak, a plaintiff he must show that he was prevented from speaking while someone espousing another viewpoint was permitted to do so.[15]

The fear that speech might persuade or that people would make bad decisions if given truthful information cannot justify content-based burdens on speech.[16]

Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints, and prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others.[17] In administering a public forum, the government may not permit speech that expresses one viewpoint while prohibiting speech expressing the opposite viewpoint; the government has no authority to license one side of a debate to fight freestyle while forbidding the other to fight at all.[18]

The First Amendment's hostility to content-based regulation extends not only to restrictions on a particular viewpoint but also to a prohibition of public discussion about an entire topic,[19] inasmuch as allowing a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth.[20] Before exempting a category of speech from the normal prohibition on content-based restrictions, the Supreme Court must be presented with persuasive evidence that a novel restriction on content is part of a long, if heretofore unrecognized, tradition of proscription.[21] Without persuasive evidence that a novel restriction on content is part of long, if heretofore unrecognized, tradition of proscription, the legislature may not revise the judgment of the American people, embodied in First Amendment, that the benefits of the Amendment's restrictions on government outweigh the costs.[22] However, when totally proscribable speech is at issue, content-based regulation is permissible as long as there is no realistic possibility that official suppression of ideas is afoot.[23] Content discrimination among various instances of a class of proscribable speech does not pose a threat to the marketplace of ideas when the selected subclass is chosen for the very reason that the entire class can be proscribed.[24]

  

The First Amendment does not forbid viewpoint-neutral exclusion of speakers who would disrupt a nonpublic forum and hinder its effectiveness for its intended purpose; however, the existence of reasonable grounds for limiting access to a nonpublic forum will not save a regulation that is in reality a facade for viewpoint-based discrimination.[25]

A First Amendment challenge to a statute may also be based on the fact that it abridges too little speech.[26] Underinclusivity in regulating speech creates a First Amendment concern when the state regulates one aspect of a problem while declining to regulate a different aspect of the problem that affects its stated interest in a comparable way.[27] While it is always somewhat counterintuitive to argue that a law violates the First Amendment by abridging too little speech, underinclusiveness can raise doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint, or underinclusiveness can reveal that a law does not actually advance a compelling interest.[28] However, the First Amendment imposes no freestanding underinclusiveness limitation, and a state need not address all aspects of a problem in one fell swoop; policymakers may focus on their most pressing concerns.[29]

Where a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling government interest,[30] and if a less restrictive alternative would serve the government's purpose, the legislature must use that alternative.[31] An adequate alternative channel of communication, required for a speech restriction to survive constitutional scrutiny, does not have to be the speaker's first or best choice, or one that provides the same audience or impact for the speech, but the alternative must be more than merely theoretically available, and it must be realistic as well.[32] An alternative channel of communication, required for a speech restriction to survive constitutional scrutiny, is not realistic when it requires a speaker significantly -and perhaps prohibitively-more time to reach the same audience.[33] Where a plausible, less restrictive alternative is offered to a content-based speech restriction, it is the government's obligation to prove that the alternative will be ineffective to achieve its goals.[34] Where the designed benefit of a content-based speech restriction is to shield the sensibilities of the listeners, the general rule is that the right of expression prevails, even where no less restrictive alternative exists.[35]



Footnotes

1 National Institute of Family and Life Advocates v. Becerra, 138 S. Ct. 2361, 201 L. Ed. 2d 835 (2018).

2 U.S. v. Alvarez, 567 U.S. 709, 132 S. Ct. 2537, 183 L. Ed. 2d 574 (2012).

3 Reed v. Town of Gilbert, Ariz., 576 U.S. 155, 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015).

4 Consolidated Edison Co. of New York, Inc. v. Public Service Commission of New York, 447 U.S. 530, 100 S. Ct. 2326, 65 L. Ed. 2d 319 (1980).
As to the regulation of content-neutral regulations, see §§ 479, 480.

5 Reno v. American Civil Liberties Union, 521 U.S. 844, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997).

6 Christian Legal Soc. Chapter of the University of California, Hastings College of the Law v. Martinez, 561 U.S. 661, 130 S. Ct. 2971, 177 L. Ed. 2d 838, 57 A.L.R. Fed. 2d 573 (2010).

7 Calvary Chapel Church, Inc. v. Broward County, Fla., 299 F. Supp. 2d 1295 (S.D. Fla. 2003).

8 Reed v. Town of Gilbert, Ariz., 576 U.S. 155, 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015); Wood v. Moss, 572 U.S. 744, 134 S. Ct. 2056, 188 L. Ed. 2d 1039 (2014); Rosenberger v. Rector and Visitors of University of Virginia, 515 U.S. 819, 115 S. Ct. 2510, 132 L. Ed. 2d 700, 101 Ed. Law Rep. 552 (1995); Alliance for Open Society Intern., Inc. v. U.S. Agency for Intern. Development, 651 F.3d 218 (2d Cir. 2011), aff'd, 570 U.S. 205, 133 S. Ct. 2321, 186 L. Ed. 2d 398 (2013).

9 Rosenberger v. Rector and Visitors of University of Virginia, 515 U.S. 819, 115 S. Ct. 2510, 132 L. Ed. 2d 700, 101 Ed. Law Rep. 552 (1995); Startzell v. City of Philadelphia, Pennsylvania, 533 F.3d 183 (3d Cir. 2008); Denke v. Shoemaker, 2008 MT 418, 347 Mont. 322, 198 P.3d 284 (2008).

10 Startzell v. City of Philadelphia, Pennsylvania, 533 F.3d 183 (3d Cir. 2008).

11 Olasz v. Welsh, 301 Fed. Appx. 142 (3d Cir. 2008).

12 Ysursa v. Pocatello Educ. Ass'n, 555 U.S. 353, 129 S. Ct. 1093, 172 L. Ed. 2d 770, 72 A.L.R.6th 751 (2009); Davenport v. Washington Educ. Ass'n, 551 U.S. 177, 127 S. Ct. 2372, 168 L. Ed. 2d 71 (2007); U.S. v. Playboy Entertainment Group, Inc., 529 U.S. 803, 120 S. Ct. 1878, 146 L. Ed. 2d 865 (2000).

13 Sorrell v. IMS Health Inc., 564 U.S. 552, 131 S. Ct. 2653, 180 L. Ed. 2d 544, 67 A.L.R.6th 755 (2011); U.S. v. Playboy Entertainment Group, Inc., 529 U.S. 803, 120 S. Ct. 1878, 146 L. Ed. 2d 865 (2000).

14 Davenport v. Washington Educ. Ass'n, 551 U.S. 177, 127 S. Ct. 2372, 168 L. Ed. 2d 71 (2007).

15 McCullen v. Coakley, 573 U.S. 464, 134 S. Ct. 2518, 189 L. Ed. 2d 502 (2014).

16 Sorrell v. IMS Health Inc., 564 U.S. 552, 131 S. Ct. 2653, 180 L. Ed. 2d 544, 67 A.L.R.6th 755 (2011).

17 Citizens United v. Federal Election Com'n, 558 U.S. 310, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010).

18 Grossbaum v. Indianapolis-Marion County Bldg. Authority, 100 F.3d 1287 (7th Cir. 1996); Mahoney v. Babbitt, 105 F.3d 1452 (D.C. Cir. 1997).

As to what constitutes a public forum, see § 540.

19 Reed v. Town of Gilbert, Ariz., 576 U.S. 155, 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015).

20 Consolidated Edison Co. of New York, Inc. v. Public Service Commission of New York, 447 U.S. 530, 100 S. Ct. 2326, 65 L. Ed. 2d 319 (1980).

21 U.S. v. Alvarez, 567 U.S. 709, 132 S. Ct. 2537, 183 L. Ed. 2d 574 (2012).

22 Brown v. Entertainment Merchants Ass'n, 564 U.S. 786, 131 S. Ct. 2729, 180 L. Ed. 2d 708 (2011).

23 Davenport v. Washington Educ. Ass'n, 551 U.S. 177, 127 S. Ct. 2372, 168 L. Ed. 2d 71 (2007).

24 Davenport v. Washington Educ. Ass'n, 551 U.S. 177, 127 S. Ct. 2372, 168 L. Ed. 2d 71 (2007).

25 Cornelius v. NAACP Legal Defense and Educational Fund, Inc., 473 U.S. 788, 105 S. Ct. 3439, 87 L. Ed. 2d 567 (1985); Jacobsen v. Howard, 109 F.3d 1268 (8th Cir. 1997).

As to what constitutes a nonpublic forum, see § 543.

26 Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993).

27 Williams-Yulee v. Florida Bar, 575 U.S. 433, 135 S. Ct. 1656, 191 L. Ed. 2d 570 (2015).

28 Williams-Yulee v. Florida Bar, 575 U.S. 433, 135 S. Ct. 1656, 191 L. Ed. 2d 570 (2015).

29 Williams-Yulee v. Florida Bar, 575 U.S. 433, 135 S. Ct. 1656, 191 L. Ed. 2d 570 (2015).

30 Williams-Yulee v. Florida Bar, 575 U.S. 433, 135 S. Ct. 1656, 191 L. Ed. 2d 570 (2015).

31 U.S. v. Playboy Entertainment Group, Inc., 529 U.S. 803, 120 S. Ct. 1878, 146 L. Ed. 2d 865 (2000).

32 Horina v. City of Granite City, Ill., 538 F.3d 624 (7th Cir. 2008), opinion amended on other grounds on denial of reh'g, 548 F.3d 1107 (7th Cir. 2008).

33 Horina v. City of Granite City, Ill., 538 F.3d 624 (7th Cir. 2008), opinion amended on other grounds on denial of reh'g, 548 F.3d 1107 (7th Cir. 2008).

34 U.S. v. Playboy Entertainment Group, Inc., 529 U.S. 803, 120 S. Ct. 1878, 146 L. Ed. 2d 865 (2000); IIn re Warner, 21 So. 3d 218 (La. 2009).

35 U.S. v. Playboy Entertainment Group, Inc., 529 U.S. 803, 120 S. Ct. 1878, 146 L. Ed. 2d 865 (2000).

End of Document

# 16A Am. Jur. 2d Constitutional Law § 469

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**IX. Fundamental Constitutional Rights and Privileges**

**C. Particular Fundamental Constitutional Rights**

**1. First Amendment Rights Guaranteed by Constitution**

**c. Freedom of Speech and Press**

**(2) Scope of Constitutional Guarantees of Free Speech and Press**

**(a) In General**

## § 469. Regulations based on speaker's viewpoint or content of speech—Particular content-based regulations

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 1516 to 1518, 1552

In consonance with the principles generally proscribing regulations based on a speaker's viewpoint or the content of the speech,[1] the courts have held that—

— the Stolen Valor Act's prohibition on false claims of receipt of military decorations or medals constitutes a content-base restriction on free speech, in violation of the First Amendment.[2]

— a statute criminalizing the commercial creation, sale, or possession of depictions of animal cruelty regulates expression based on content, and the statute is presumptively invalid under the First Amendment as the statute restricts visual and auditory depictions, such as photographs, videos, or sound recordings, depending on whether they depict conduct in which a living animal was intentionally harmed.[3]

  

— a regulation prohibiting local recipients of Legal Services Corporation funds from engaging in representation involving an effort to amend or otherwise challenge the validity of existing welfare laws is impermissible viewpoint discrimination in violation of the First Amendment.[4]

— the provisions of a federal statute prohibiting the transmission of obscene or indecent communications over the Internet to persons under the age of 18, or sending patently offensive communications through the use of an interactive computer service to persons under that age are unconstitutional as content-based prior restraints on speech.[5]

— a statutory provision prohibiting signs or displays critical of foreign governments within 500 feet of their embassies, although not viewpoint-based, is a content-based restriction on political speech in a public forum which is not narrowly tailored to serve a compelling state interest and violates the First Amendment.[6]

— a "heckler's veto" is an impermissible content-based restriction on speech where the speech is prohibited due to an anticipated disorderly or violent reaction of the audience.[7]

— a state statute prohibiting the release of the residential address, telephone number, and other personal information of law enforcement officers and court employees with intent to harm or intimidate is deemed to be "content-based," for First Amendment purposes, since the statute prohibited truthful, lawfully obtained, publicly available personal identifying information based solely on whether the information identified law enforcement-related, corrections officer-related, or court-related employees.[8]

On the other hand, the courts have held that—

— a Federal Trade Commission rule requiring that an automated telephone services provider furnish a two-second connection to a sales representative when a call generated by a telemarketer is answered is not a content-based restriction on speech barred by the First Amendment, when applied to calls by the provider at the direction of a charity, since the government has a legitimate interest in limiting nuisance calls to telephone subscribers, the interest is furthered by a narrowly tailored restriction, and there was no appreciable limitation on charitable solicitations as the restriction was minimal and charities could solicit directly.[9]

— a statute prohibiting persons from standing in the traveled portion of a roadway for the purpose of soliciting a ride, employment, or business from vehicle occupants, which precluded news vendors from standing in the roadway to sell newspapers to passing motorists, is not impermissibly content-based, even though it does not burden all communication potentially disruptive to traffic, such as political campaigning, absent any evidence that the state disagreed with the viewpoints within the forbidden categories.[10]



Footnotes

1 § 468.

2 U.S. v. Alvarez, 567 U.S. 709, 132 S. Ct. 2537, 183 L. Ed. 2d 574 (2012).

3 U.S. v. Stevens, 559 U.S. 460, 130 S. Ct. 1577, 176 L. Ed. 2d 435 (2010).

4 Legal Services Corp. v. Velazquez, 531 U.S. 533, 121 S. Ct. 1043, 149 L. Ed. 2d 63 (2001).

5 Reno v. American Civil Liberties Union, 521 U.S. 844, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997).

6 Boos v. Barry, 485 U.S. 312, 108 S. Ct. 1157, 99 L. Ed. 2d 333 (1988).

7 Startzell v. City of Philadelphia, Pennsylvania, 533 F.3d 183 (3d Cir. 2008); Roe v. Crawford, 514 F.3d 789 (8th Cir. 2008); Center for Bio-Ethical Reform, Inc. v. Los Angeles County Sheriff Dept., 533 F.3d 780 (9th Cir. 2008) (under the First Amendment, the government may not impose "heckler's veto," since regulation of speech that depends upon the listeners' reaction to the speech is not content-neutral).

8 Sheehan v. Gregoire, 272 F. Supp. 2d 1135 (W.D. Wash. 2003).

9 The Broadcast Team, Inc. v. F.T.C., 429 F. Supp. 2d 1292 (M.D. Fla. 2006).

10 Sun-Sentinel Co. v. City of Hollywood, 274 F. Supp. 2d 1323 (S.D. Fla. 2003).

End of Document

# 16A Am. Jur. 2d Constitutional Law § 470

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**IX. Fundamental Constitutional Rights and Privileges**

**C. Particular Fundamental Constitutional Rights**

**1. First Amendment Rights Guaranteed by Constitution**

**c. Freedom of Speech and Press**

**(2) Scope of Constitutional Guarantees of Free Speech and Press**

**(a) In General**

## § 470. Guarantees of free speech and press as protecting publication, distribution, and receipt of material

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 1490, 1497, 1502

The constitutional guarantee of freedom of speech and of the press embraces the distribution or circulation of speech[1] and also protects the publication of, and necessarily protects the right to receive[2] and read,[3] or to see and hear,[4] the matter being distributed or broadcast.[5] The freedom of speech under the First Amendment is not merely the freedom to speak but is also the freedom to read.[6] Moreover, while the First Amendment protects not only the right to engage in protected speech but also the right to receive such speech,[7] the rights of the recipients of speech are derived in the first instance from the primary rights of the speaker.[8]

**Observation:**

The regulation by the government of the radio and television broadcast industry presents a particular concern with regard to the means of distribution of protected speech. Where some degree of governmental control must be tolerated for the broadcast of speech to be effective, the Supreme Court has developed an intermediate scrutiny standard, under which, for First Amendment free speech purposes, the government may employ a means of its own choosing as long as the regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation and does not burden substantially more speech than is necessary to further that interest.[9]

Liberty in circulating one's speech is as essential to the freedom as is the liberty of publishing since publication without circulation would be of little value.[10] The freedom of speech is indispensable to the discovery and spread of political truth and the best test of truth is the power of the thought to get itself accepted in the competition of the market.[11] The freedom of speech and of the press assured by state and federal constitutions are as much infringed by an improper interference with distribution as by an improper interference with publication.[12]

The courts have ever been alert to strike down any infringement or limitation upon the fundamental right freely to publish and distribute news and comments.[13] The highest form of state interest must be involved in order to sustain the validity, under the First Amendment, of a statute imposing a penal sanction for the publication of lawfully obtained, truthful information; when a state attempts to punish publication after the event, it must demonstrate that its punitive action is necessary for the state interest asserted.[14] Where a rape victim brought suit against a newspaper for publishing her name which it had obtained from a publicly released police report, and the state courts awarded the rape victim compensatory and punitive damages, and the newspaper appealed, the Supreme Court held that imposing damages on the newspaper violated the First Amendment since the information was obtained lawfully, the identification of the victim was accurate, and imposing liability did not serve to further a state interest of the highest order.[15]

Although distribution of information is constitutionally protected, still, the peace, good order, and comfort of the community may imperatively require some regulation of the time, place, and manner thereof;[16] and the enforcement of general laws against the press is not, under the First Amendment, subject to stricter scrutiny than would be applied to enforcement against other persons or organizations.[17]



Footnotes

1 Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 83 S. Ct. 631, 9 L. Ed. 2d 584 (1963).
Handing out leaflets in the advocacy of a politically controversial viewpoint is the essence of First Amendment expression; no form of speech is entitled to greater constitutional protection. McCullen v. Coakley, 573 U.S. 464, 134 S. Ct. 2518, 189 L. Ed. 2d 502 (2014).

2 Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico, 457 U.S. 853, 102 S. Ct. 2799, 73 L. Ed. 2d 435, 4 Ed. Law Rep. 1013 (1982).

3 Weaver v. Jordan, 64 Cal. 2d 235, 49 Cal. Rptr. 537, 411 P.2d 289 (1966).

4 Turner Broadcasting System, Inc. v. F.C.C., 520 U.S. 180, 117 S. Ct. 1174, 137 L. Ed. 2d 369 (1997).

5 Griswold v. Connecticut, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965).

6 King v. Federal Bureau of Prisons, 415 F.3d 634 (7th Cir. 2005).

7 Doe ex rel. Doe v. Governor of New Jersey, 783 F.3d 150 (3d Cir. 2015).

8 Spargo v. New York State Com'n on Judicial Conduct, 351 F.3d 65 (2d Cir. 2003).

9 Turner Broadcasting System, Inc. v. F.C.C., 520 U.S. 180, 117 S. Ct. 1174, 137 L. Ed. 2d 369 (1997).

10 Talley v. California, 362 U.S. 60, 80 S. Ct. 536, 4 L. Ed. 2d 559 (1960).

11 Consolidated Edison Co. of New York, Inc. v. Public Service Commission of New York, 447 U.S. 530, 100 S. Ct. 2326, 65 L. Ed. 2d 319 (1980).

12 Brown v. Kingsley Books, Inc., 1 N.Y.2d 177, 151 N.Y.S.2d 639, 134 N.E.2d 461 (1956), judgment aff'd, 354 U.S. 436, 77 S. Ct. 1325, 1 L. Ed. 2d 1469 (1957).

13 Jacobsen v. Howard, 109 F.3d 1268 (8th Cir. 1997).

14 Smith v. Daily Mail Pub. Co., 443 U.S. 97, 99 S. Ct. 2667, 61 L. Ed. 2d 399 (1979).

15 The Florida Star v. B.J.F., 491 U.S. 524, 109 S. Ct. 2603, 105 L. Ed. 2d 443 (1989).

16 § 536.

17 Cohen v. Cowles Media Co., 501 U.S. 663, 111 S. Ct. 2513, 115 L. Ed. 2d 586 (1991).

End of Document

# 16A Am. Jur. 2d Constitutional Law § 471

**American Jurisprudence, Second Edition** | May 2021 Update

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**IX. Fundamental Constitutional Rights and Privileges**

**C. Particular Fundamental Constitutional Rights**

**1. First Amendment Rights Guaranteed by Constitution**

**c. Freedom of Speech and Press**

**(2) Scope of Constitutional Guarantees of Free Speech and Press**

**(a) In General**

## § 471. Constitutional protection of speech as extending to silence; right not to speak

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 1503

The right not to speak inheres in political and commercial speech alike and extends to statements of fact as well as statements of opinion.[1] The difference between compelled speech and compelled silence is without constitutional significance in the context of protected speech, as the First Amendment guarantees "freedom of speech," a term necessarily comprising the decision of both what to say and what not to say.[2]

The First Amendment protects against government infringement on the right to speak freely and the right to refrain from speaking at all.[3] The right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.[4] Indeed, there are numerous cases supporting the view that the First Amendment protects the right of persons to refrain from speaking.[5]

**Observation:**

  

One important manifestation of the principle of free speech is that one who chooses to speak may also decide what to say and what not to say.[6] Indeed, a speaker has a right under the First Amendment to be free from state interference and has the autonomy to choose what not to say.[7] Moreover, the right to speak does not carry with it a duty on the part of the hearer to listen; a hearer is entitled to the same protection of his or her rights as the speaker.[8]



Footnotes

1 International Dairy Foods Ass'n v. Amestoy, 92 F.3d 67 (2d Cir. 1996).

2 Riley v. National Federation of the Blind of North Carolina, Inc., 487 U.S. 781, 108 S. Ct. 2667, 101 L. Ed. 2d 669 (1988).

3 U.S. v. Philip Morris USA Inc., 566 F.3d 1095, 73 Fed. R. Serv. 3d 896 (D.C. Cir. 2009).

4 Janus v. American Federation of State, County, and Mun. Employees, Council 31, 138 S. Ct. 2448, 201 L. Ed. 2d 924 (2018); Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds, 530 F.3d 724 (8th Cir. 2008).

5 Riley v. National Federation of the Blind of North Carolina, Inc., 487 U.S. 781, 108 S. Ct. 2667, 101 L. Ed. 2d 669 (1988); Wooley v. Maynard, 430 U.S. 705, 97 S. Ct. 1428, 51 L. Ed. 2d 752 (1977).

6 Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995).

7 South Boston Allied War Veterans Council v. City of Boston, 297 F. Supp. 2d 388 (D. Mass. 2003).

8 Operation Rescue-National v. Planned Parenthood of Houston and Southeast Texas, Inc., 975 S.W.2d 546 (Tex. 1998).

**End of Document**

# 16A Am. Jur. 2d Constitutional Law § 472

**American Jurisprudence, Second Edition** | May 2021 Update

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**C. Particular Fundamental Constitutional Rights**

**1. First Amendment Rights Guaranteed by Constitution**

**c. Freedom of Speech and Press**

**(2) Scope of Constitutional Guarantees of Free Speech and Press**

**(a) In General**

## § 472. Constitutional protection of speech as prohibiting compelled or coerced speech; compelling subsidized speech of others

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 1503, 1563, 1564

If there is any fixed star in the constitutional constellation, it is that no official, high or petty, can prescribe what is orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein, and compelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command.[1] Regulations which compel ideological speech pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion.[2] The First Amendment protects persons from being compelled to express adherence to an ideological point of view which they find unacceptable.[3] There is also authority holding that the First Amendment's proscription of compelled speech does not turn on the ideological content of the message that the speaker is being forced to carry; the constitutional harm, and what the First Amendment prohibits, is being forced to speak rather than to remain silent.[4]

The First Amendment right to freedom of speech protects an individual's right not to participate in a flag salute or a pledge of allegiance to the United States flag.[5] Newspaper editors or publishers have also been held to have a First Amendment right,

under the guarantee of freedom of the press, to refuse to print a political advertisement in the exercise of its editorial control and judgment.[6]

**Observation:**

For purposes of the free speech clause, simple obedience to a law that does not require one to convey a verbal or symbolic message cannot reasonably be seen as a statement of support for the law or its purpose.[7]

The provisions of a state abortion statute, requiring a physician, before performing an abortion, to provide information to his or her patient about the nature of the abortion procedure, the health risks of abortion and of childbirth, and the probable gestational age of the unborn child, do not violate a physician's First Amendment rights not to speak since the statute implicates such rights only as part of the practice of medicine, which is subject to reasonable licensing and regulation by the state.[8]

**Observation:**

Regulations of the Department of Health and Human Services (HHS) prohibiting recipients of funds under Title X of the Public Health Service Act from engaging in abortion counseling, referral, and activities advocating abortion as a method of family planning do not violate the First Amendment as conditioning receipt of a benefit (Title X funding) on relinquishment of the First Amendment right to engage in abortion advocacy and counseling. Such regulations do not force any Title X grantee or its employees to give up abortion-related speech; they merely require that such activities be kept separate and distinct from activities of the Title X project.[9]

The compelled speech rights of middle and high school students are deemed not violated by the school district's request that they complete a survey regarding their private lives for use in planning community youth activities, even if the completion is involuntary, where the surveys are anonymous and the results are only released in an aggregate form.[10]

A federal statute, known as the Solomon Amendment, which requires law schools to offer military recruiters the same access to its campus and students that it provides to nonmilitary recruiters receiving the most favorable access in order for the school and its university to receive federal funding does not compel schools to speak the government's message as would implicate First Amendment concerns where the statute does not dictate the content of speech, and the speech is "compelled" only to the extent that the school provided such speech for other recruiters.[11]

The provision of an injunction against the operation of a tax protestor's web site, requiring him or her to place the injunctive order prominently on his or her web site, does not constitute unconstitutionally forced speech.[12]

  

Internet generic Top Level Domains (gTLDs) do not constitute compelled speech in violation of the First Amendment, since such gTLDs do not constitute "speech."[13]



Footnotes

1 Janus v. American Federation of State, County, and Mun. Employees, Council 31, 138 S. Ct. 2448, 201 L. Ed. 2d 924 (2018).

2 Stuart v. Camnitz, 774 F.3d 238 (4th Cir. 2014).

3 People of State of Cal. v. F.C.C., 75 F.3d 1350 (9th Cir. 1996).

4 Axson-Flynn v. Johnson, 356 F.3d 1277, 184 Ed. Law Rep. 702 (10th Cir. 2004).

5 Russo v. Central School Dist. No. 1, Towns of Rush, Et Al., Monroe County, State of N.Y., 469 F.2d 623 (2d Cir. 1972); Frazier ex rel. Frazier v. Winn, 535 F.3d 1279, 235 Ed. Law Rep. 737 (11th Cir. 2008).

6 Am. Jur. 2d, Newspapers, Periodicals, and Press Associations § 20.

7 North Coast Women's Care Medical Group, Inc. v. Superior Court, 44 Cal. 4th 1145, 81 Cal. Rptr. 3d 708, 189 P.3d 959 (2008).

8 Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992).

9 Rust v. Sullivan, 500 U.S. 173, 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991).

10 C.N. v. Ridgewood Bd. of Educ., 430 F.3d 159, 203 Ed. Law Rep. 468 (3d Cir. 2005).

11 Rumsfeld v. Forum for Academic and Institutional Rights, Inc., 547 U.S. 47, 126 S. Ct. 1297, 164 L. Ed. 2d 156, 206 Ed. Law Rep. 819 (2006).

12 U.S. v. Bell, 414 F.3d 474 (3d Cir. 2005).

13 Name.Space, Inc. v. Network Solutions, Inc., 202 F.3d 573 (2d Cir. 2000).

**End of Document**

# 16A Am. Jur. 2d Constitutional Law § 473

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**IX. Fundamental Constitutional Rights and Privileges**

**C. Particular Fundamental Constitutional Rights**

**1. First Amendment Rights Guaranteed by Constitution**

**c. Freedom of Speech and Press**

**(2) Scope of Constitutional Guarantees of Free Speech and Press**

**(a) In General**

## § 473. Prohibition of compelling subsidized speech of others

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 1503, 1563, 1564

Compelling a person to subsidize the speech of other private speakers also raises First Amendment concerns[1] and presents the same dangers as compelled speech.[2] The general rule is that individuals should not be compelled to subsidize private groups or private speech,[3] or pay subsidies for speech to which they object.[4]

First Amendment values would be at serious risk if the government could compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that the government favors.[5] Except perhaps in the rarest of circumstances, no person may be compelled to subsidize speech by a third party that he or she does not wish to support.[6] By logical extension, the First Amendment also does not compel the government to compel its employees to subsidize speech.[7]

In accord with the First Amendment right to freedom of speech, public employees may prevent a union from spending part of their compulsory service fees to express political views which the employees oppose and which are unrelated to the union's duties as exclusive bargaining representative.[8]

  

**Observation:**

There is no First Amendment right not to fund government speech,[9] and a government speaker is free to express a viewpoint, and the government is also free to fund the expression of certain viewpoints based on their content.[10] This is no less true when funding is achieved through targeted assessments devoted exclusively to a program to which some assessed citizens object rather than through general taxes.[11]

**CUMULATIVE SUPPLEMENT**

**Cases:**

First Amendment not only protects against prohibitions of speech, but also against regulations that compel speech. U.S. Const. Amend. 1. Hanover County Unit of the NAACP v. Hanover County, 461 F. Supp. 3d 280 (E.D. Va. 2020).

**[END OF SUPPLEMENT]**



Footnotes

1 Janus v. American Federation of State, County, and Mun. Employees, Council 31, 138 S. Ct. 2448, 201 L. Ed. 2d 924 (2018) (to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors is sinful and tyrannical).

2 Harris v. Quinn, 573 U.S. 616, 134 S. Ct. 2618, 189 L. Ed. 2d 620 (2014).
As to the prohibition of compelled speech, see § 472.

3 Knox v. Service Employees Intern. Union, Local 1000, 567 U.S. 298, 132 S. Ct. 2277, 183 L. Ed. 2d 281 (2012).

4 U.S. v. United Foods, Inc., 533 U.S. 405, 121 S. Ct. 2334, 150 L. Ed. 2d 438 (2001); Avocados Plus Inc. v. Johanns, 421 F. Supp. 2d 45 (D.D.C. 2006); Livestock Marketing Ass'n v. U.S. Dept. of Agriculture, 2001 DSD 5, 132 F. Supp. 2d 817 (D.S.D. 2001).

5 Knox v. Service Employees Intern. Union, Local 1000, 567 U.S. 298, 132 S. Ct. 2277, 183 L. Ed. 2d 281 (2012).

6 Harris v. Quinn, 573 U.S. 616, 134 S. Ct. 2618, 189 L. Ed. 2d 620 (2014).

7 Madison Teachers, Inc. v. Walker, 2014 WI 99, 358 Wis. 2d 1, 851 N.W.2d 337 (2014).

8 Abood v. Detroit Bd. of Ed., 431 U.S. 209, 97 S. Ct. 1782, 52 L. Ed. 2d 261 (1977) (overruled on other grounds by, Janus v. American Federation of State, County, and Mun. Employees, Council 31, 138 S. Ct. 2448, 201 L. Ed. 2d 924 (2018)).

9 Johanns v. Livestock Marketing Ass'n, 544 U.S. 550, 125 S. Ct. 2055, 161 L. Ed. 2d 896 (2005) (holding that the generic advertising funded by the targeted assessment on beef producers is "government speech," not susceptible to First Amendment compelled-subsidy challenge); Avocados Plus Inc. v. Johanns, 421 F. Supp. 2d 45 (D.D.C. 2006); Cricket Hosiery, Inc. v. U.S., 30 Ct. Int'l Trade 576, 429 F. Supp. 2d 1338 (2006).

10 Liberty and Prosperity 1776, Inc. v. Corzine, 720 F. Supp. 2d 622 (D.N.J. 2010).

11 Johanns v. Livestock Marketing Ass'n, 544 U.S. 550, 125 S. Ct. 2055, 161 L. Ed. 2d 896 (2005).

End of Document

# 16A Am. Jur. 2d Constitutional Law § 474

**American Jurisprudence, Second Edition** | May 2021 Update

**Constitutional Law**
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**IX. Fundamental Constitutional Rights and Privileges**

**C. Particular Fundamental Constitutional Rights**

**1. First Amendment Rights Guaranteed by Constitution**

**c. Freedom of Speech and Press**

**(2) Scope of Constitutional Guarantees of Free Speech and Press**

**(a) In General**

## § 474. Freedom of legislative debate; parliamentary freedom

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 1775

Legislators are generally immune from any type of action against them, civil or criminal, for acts done or statements made in their official capacity.[1] In the case of United States Senators and Representatives, this immunity is protected by a constitutional provision stating that for any speech or debate in either House of Congress, they may not be questioned in any other place.[2] There are similar provisions in most state constitutions, but the privilege was well established in the common law even before these constitutions were adopted.[3] The privilege is given, not for the benefit of the legislators, but to support the rights of the people by enabling their representatives to function freely without fear of harassment. It is therefore to be liberally construed, and, for the same reason, a claim of unworthy motive does not destroy the privilege.[4]



Footnotes

1 As to immunity with respect to defamatory matter published or uttered in the performance of legislative functions, see Am. Jur. 2d, Libel and Slander §§ 277, 278.

2 U.S. Const. Art. I, § 6, cl. 1.

3 Am. Jur. 2d, States, Territories, and Dependencies § 62.

4 Am. Jur. 2d, States, Territories, and Dependencies § 62.

End of Document

# 16A Am. Jur. 2d Constitutional Law § 475

**American Jurisprudence, Second Edition** | May 2021 Update

**Constitutional Law**

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**IX. Fundamental Constitutional Rights and Privileges**

**C. Particular Fundamental Constitutional Rights**

**1. First Amendment Rights Guaranteed by Constitution**

**c. Freedom of Speech and Press**

**(2) Scope of Constitutional Guarantees of Free Speech and Press**

**(b) Freedom from Prior Restraint**

## § 475. Freedom from prior restraints and censorship, generally

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 1499, 1525 to 1528

**A.L.R. Library**

Constitutionality of National Security Letters Issued Pursuant to 18 U.S.C.A. s2709, 25 A.L.R. Fed. 2d 547

Propriety, under First Amendment, of school board's censorship of public school libraries or coursebooks, 64 A.L.R. Fed. 771

Construction and application of Public Broadcasting Act of 1967 as amended (47 U.S.C.A. secs. 396 et seq.) with respect to controlling content of public television programs, 44 A.L.R. Fed. 350

**Forms**

  

Forms relating to censorship, generally, see Am. Jur. Pleading and Practice Forms, Constitutional Law [Westlaw® Search Query]

Freedom of speech and of the press, historically considered and taken up by the Federal Constitution, means principally, although not exclusively,[1] immunity from previous restraints or censorship.[2] The term "prior restraint," for purposes of the right to free speech, is an administrative or judicial order forbidding certain communications when issued in advance of the time that such communications are to occur.[3] A prior restraint on speech is the most serious and least tolerable infringement on First Amendment rights.[4] Temporary restraining orders and permanent injunctions, court orders that actually forbid speech activities, are classic examples of prior restraints.[5] Warnings from a court with respect to the exercise of speech have a bearing on whether there is a prior restraint.[6] Each passing day of a prior restraint on speech may constitute a separate and cognizable infringement of the First Amendment.[7]

The First Amendment directs courts to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good.[8] An essential element of the liberty of the press is its freedom from all censorship over what can be published, and exemption from control, in advance, as to what can appear in print.[9] Censorship is a form of infringement upon the freedom of expression to be especially condemned.[10] Indeed, the First Amendment does not permit the censorship of expression not brigaded with illegal action.[11] For First Amendment purposes, prohibiting the publication of a news story is the essence of censorship and is allowed only under exceptional circumstances.[12]

Improper restraints on communication may vary in form and degree but all have the effect of restricting the dissemination of ideas. The clearest abuse is an outright prohibition of a constitutionally protected form of speech, but regulation short of absolute prohibition is also invalid where expression is made dependent upon state approval by the obtaining of a permit or is conditioned upon obtaining the approval of the board of censors; nor does the restriction become permissible because it merely limits the manner of expression rather than the initial right to communicate.[13] Permit schemes and advance notice requirements that potentially apply to small groups are nearly always overly broad and lack narrow tailoring in violation of free speech rights.[14] The major First Amendment risks associated with unbridled licensing schemes are self-censorship by speakers in order to avoid being denied a license to speak and the difficulty of effectively detecting, reviewing, and correcting content-based censorship as applied without standards by which to measure the licensor's actions.[15]

**Practice Tip:**

A plaintiff may challenge a statute as overly vague in violation of the First Amendment where the statute's deterrent effect on legitimate expression is both real and substantial and the statute is not readily subject to a narrowing construction by the state courts.[16]

  

The first step in assessing the constitutionality of a prior restraint requires considering whether the harm the court seeks to prevent justifies the restraint on speech.[17] A prior restraint of speech cannot be upheld under the First Amendment unless justified by a compelling state interest to protect against a serious and identified threat of harm.[18]



Footnotes

1 Smith v. Daily Mail Pub. Co., 443 U.S. 97, 99 S. Ct. 2667, 61 L. Ed. 2d 399 (1979) (the First Amendment protection reaches beyond prior restraints).

2 City of Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750, 108 S. Ct. 2138, 100 L. Ed. 2d 771 (1988).

3 Alexander v. U.S., 509 U.S. 544, 113 S. Ct. 2766, 125 L. Ed. 2d 441 (1993); John Doe, Inc. v. Mukasey, 549 F.3d 861 (2d Cir. 2008), as modified on other grounds, (Mar. 26, 2009); Davis v. East Baton Rouge Parish School Bd., 78 F.3d 920, 107 Ed. Law Rep. 540 (5th Cir. 1996); State v. Lead Industries, Ass'n, Inc., 951 A.2d 428 (R.I. 2008); In re State Farm Lloyds, 254 S.W.3d 632 (Tex. App. Dallas 2008); In re Marriage of Meredith, 148 Wash. App. 887, 201 P.3d 1056 (Div. 2 2009).

4 Berger v. City of Seattle, 569 F.3d 1029 (9th Cir. 2009); Freedom Communications, Inc. v. Superior Court, 167 Cal. App. 4th 150, 83 Cal. Rptr. 3d 861 (4th Dist. 2008), as modified on other grounds, (Sept. 29, 2008); St. James Healthcare v. Cole, 2008 MT 44, 341 Mont. 368, 178 P.3d 696 (2008); People v. Mendelson, 24 Misc. 3d 307, 875 N.Y.S.2d 766 (Dist. Ct. 2009).

5 In re Marriage of Meredith, 148 Wash. App. 887, 201 P.3d 1056 (Div. 2 2009).

6 Multimedia Holdings Corp. v. Circuit Court of Florida, St. Johns County, 544 U.S. 1301, 125 S. Ct. 1624, 161 L. Ed. 2d 590 (2005).

7 Procter & Gamble Co. v. Bankers Trust Co., 78 F.3d 219, 1996 FED App. 0076P (6th Cir. 1996).

8 Sorrell v. IMS Health Inc., 564 U.S. 552, 131 S. Ct. 2653, 180 L. Ed. 2d 544, 67 A.L.R.6th 755 (2011); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 116 S. Ct. 1495, 134 L. Ed. 2d 711 (1996).

9 Pell v. Procunier, 417 U.S. 817, 94 S. Ct. 2800, 41 L. Ed. 2d 495 (1974).

10 Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 72 S. Ct. 777, 96 L. Ed. 1098 (1952).

11 A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Com. of Mass., 383 U.S. 413, 86 S. Ct. 975, 16 L. Ed. 2d 1 (1966).

12 Procter & Gamble Co. v. Bankers Trust Co., 78 F.3d 219, 1996 FED App. 0076P (6th Cir. 1996).

13 Huntley v. Public Utilities Commission, 69 Cal. 2d 67, 69 Cal. Rptr. 605, 442 P.2d 685 (1968).
As to licensing regulations, generally, see § 550.

14 Doyle v. Commissioner, New Hampshire Dept. of Resources and Economic Development, 163 N.H. 215, 37 A.3d 343 (2012).

15 City of Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750, 108 S. Ct. 2138, 100 L. Ed. 2d 771 (1988).

16 Faustin v. City and County of Denver, Colo., 423 F.3d 1192 (10th Cir. 2005).

17 Marceaux v. Lafayette City-Parish Consol. Government, 731 F.3d 488 (5th Cir. 2013).

18 Com. v. Barnes, 461 Mass. 644, 963 N.E.2d 1156 (2012).

End of Document

# 16A Am. Jur. 2d Constitutional Law § 476

American Jurisprudence, Second Edition | May 2021 Update

Constitutional Law
Barbara J. Van Arsdale, J.D.; James Buchwalter, J.D; Paul M. Coltoff, J.D.; John A. Gebauer, J.D.; Lonnie E. Griffith, Jr., J.D.; Janice Holben, J.D.; Sonja Larsen, J.D.; Lucas Martin, J.D.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Karl Oakes, J.D.; Karen L. Schultz, J.D.; Jeffrey J. Shampo, J.D.; and Kimberly C. Simmons, J.D.



## § 476. Standard of review for prior restraints and censorship

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 1499, 1525 to 1528, 1592

Prior restraints on free speech are not unconstitutional per se.[1] The immunity from prior restraint which is an element of the freedom of speech and of the press is, as are the freedoms themselves,[2] subject to some limitations, at least in exceptional cases.[3] The government may directly regulate speech to address extraordinary problems where its regulations are appropriately tailored to resolve those problems without imposing unnecessarily great restrictions on speech;[4] and reasonable time, place, or manner restrictions on speech are recognized exceptions to the general prohibition against prior restraints.[5] However, the barriers to prior restraint remain high,[6] since a prior restraint upon expression carries a heavy presumption of invalidity or unconstitutionality,[7] and the government has a heavy burden to establish that a particular restriction amounting to a prior restraint presents such an exceptional case.[8] A prior restraint on free speech is permitted only in exceptional cases such as war, obscenity, and incitements to acts of violence and the overthrow by force of orderly government.[9]

Prior restraints are to be accorded the most exacting review.[10] A system of prior restraint on expression avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system.[11] The Supreme Court condemns systems in which the exercise of the power of public officials to deny use of a forum in advance of

actual expression is not bounded by precise and clear standards; this distaste for censorship, reflecting the natural distaste of a free people, is deeply etched in American law.[12]

A system of prior restraint must contain the following safeguards in order not to run afoul of the First Amendment: (1) the burden of instituting judicial proceedings and proving that the material is unprotected must rest on the censor; (2) any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo; and (3) a prompt final judicial determination must be assured.[13]

A prior restraint on speech that is premised merely on protecting business interests fails First Amendment scrutiny.[14]



Footnotes

1 Richland Bookmart, Inc. v. Knox County, Tenn., 555 F.3d 512 (6th Cir. 2009); State v. Lead Industries, Ass'n, Inc., 951 A.2d 428 (R.I. 2008).

2 §§ 513 to 517.

3 Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 72 S. Ct. 777, 96 L. Ed. 1098 (1952).

4 Denver Area Educational Telecommunications Consortium, Inc. v. F.C.C., 518 U.S. 727, 116 S. Ct. 2374, 135 L. Ed. 2d 888 (1996).

5 U.S. v. Kistner, 68 F.3d 218 (8th Cir. 1995).

6 State v. Lead Industries, Ass'n, Inc., 951 A.2d 428 (R.I. 2008).

7 U.S. v. Quattrone, 402 F.3d 304 (2d Cir. 2005); People v. Mendelson, 24 Misc. 3d 307, 875 N.Y.S.2d 766 (Dist. Ct. 2009); State v. Lead Industries, Ass'n, Inc., 951 A.2d 428 (R.I. 2008); In re Marriage of Meredith, 148 Wash. App. 887, 201 P.3d 1056 (Div. 2 2009).

8 Davis v. East Baton Rouge Parish School Bd., 78 F.3d 920, 107 Ed. Law Rep. 540 (5th Cir. 1996).

9 In re Marriage of Meredith, 148 Wash. App. 887, 201 P.3d 1056 (Div. 2 2009).

10 Vance v. Universal Amusement Co., Inc., 445 U.S. 308, 100 S. Ct. 1156, 63 L. Ed. 2d 413 (1980); Cheyenne Newspapers, Inc. v. First Judicial Dist. Court, 2015 WY 113, 358 P.3d 493 (Wyo. 2015).

11 McKinney v. Alabama, 424 U.S. 669, 96 S. Ct. 1189, 47 L. Ed. 2d 387 (1976).

12 Vance v. Universal Amusement Co., Inc., 445 U.S. 308, 100 S. Ct. 1156, 63 L. Ed. 2d 413 (1980).

13 Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 95 S. Ct. 1239, 43 L. Ed. 2d 448 (1975).

14 Coulter v. Gerald Family Care, P.C., 964 A.2d 170 (D.C. 2009).

# 16A Am. Jur. 2d Constitutional Law § 477

**American Jurisprudence, Second Edition** | May 2021 Update

**Constitutional Law**
Barbara J. Van Arsdale, J.D.; James Buchwalter, J.D; Paul M. Coltoff, J.D.; John A. Gebauer, J.D.; Lonnie E. Griffith, Jr., J.D.; Janice Holben, J.D.; Sonja Larsen, J.D.; Lucas Martin, J.D.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Karl Oakes, J.D.; Karen L. Schultz, J.D.; Jeffrey J. Shampo, J.D.; and Kimberly C. Simmons, J.D.

**IX. Fundamental Constitutional Rights and Privileges**

**C. Particular Fundamental Constitutional Rights**

**1. First Amendment Rights Guaranteed by Constitution**

**c. Freedom of Speech and Press**

**(2) Scope of Constitutional Guarantees of Free Speech and Press**

**(b) Freedom from Prior Restraint**

## § 477. Permissible prior restraints and censorship

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 1499, 1525 to 1528, 1592

Based on the particular circumstances or methods of regulation involved, various other governmental or judicial acts have been upheld as permissible prior restraints or censorship, such as, preliminary injunctions restricting abortion protesters' activities outside abortion clinics which have been held not to be unlawful prior restraints on free speech, in light of the alternative channels of communication left open to the protesters.[1]

Similarly, on the basis of the particular circumstances or methods of regulation involved, the courts have held that—

— provisions of Bipartisan Campaign Reform Act of 2002 (BCRA) requiring televised electioneering communications funded by anyone other than a candidate to include a disclaimer identifying the person or entity responsible for the content of the advertising, and requiring any person spending more than $10,000 on electioneering communications within a calendar year to file a disclosure statement with the Federal Election Commission (FEC), did not violate First Amendment protection of political speech, as applied to a nonprofit corporation that wished to distribute on cable television, through video-on-demand, a film regarding a candidate seeking nomination as a political party's candidate in the next presidential election, and that wished to run three advertisements for the film.[2]

  

— a state statute, challenged on First Amendment grounds, under which persons who are nonparticipants in the proceedings of a state commission investigating judicial fitness are subject to criminal sanctions for divulging truthful information regarding the confidential proceedings before the commission did not constitute a prior restraint or attempt by the state to censor the news media, but the criminal punishment of third persons, including newspapers, pursuant to such statute is not permitted by the First Amendment guarantees of freedom of speech and of the press.[3]

— a secrecy agreement and secrecy oath exacted by the government from an employee of the Central Intelligence Agency was not a prior restraint upon the former agent's freedom of speech, where the agreement's provision for submission of material to the CIA for approval prior to publication was enforceable, provided that the CIA acted promptly upon such submissions and withheld approval of publication only of information which was classified and which had not been placed in the public domain by a prior disclosure.[4]

— although the act of blocking access to an abortion clinic could have expressive content, a federal statute providing for civil and criminal penalties for the use of force, the threat of force, or physical obstruction to injure, intimidate, or interfere with any person from obtaining or providing reproductive health services, was not violative of the free speech rights of abortion protestors, inasmuch as the statute furthered an important government interest in ensuring access to lawful services, condemned only the noncommunicative impact of conduct within its reach, and left open nonviolent, nonobstructive avenues for protestors to express their antiabortion message, including voice, signs, handbills, symbolic gestures, and other expressive means.[5]

— the recordkeeping requirements of a child protection and obscenity enforcement act and associated regulations did not constitute a prior restraint on the speech of participants in the adult entertainment industry, despite the claim that the substantial recordkeeping requirements made compliance impossible.[6]

— the government could impose a fine on a traveler to Iraq, who served for a time as a human shield protecting possible bomb targets, for violating regulations prohibiting unauthorized travel to and activities within that country, despite the claim that the fine was an impermissible restraint on the free speech component of her shield activities, where the speech regulation was justified, as the regulations were within the constitutional power of the government, the regulations fostered important foreign relations and national security interests, the interests were unrelated to the suppression of free expression, and the restrictions were no greater than necessary to advance the government's interest.[7]

— a city college's 20-month moratorium on an associate professor's "philosophical counseling," as applied to his research activities, did not violate the First Amendment, even though the fact that the research occurred in the context of an academic setting increased the weight of the professor's interest, where the college officials' concerns about risks from philosophical counseling sessions, including potential harm to students in need of professional psychological or psychiatric care and the college's potential liability for counseling, were reasonable, the moratorium was limited in time, scope, and degree, and the moratorium was imposed only in response to concerns about the legality of the professor's on-campus philosophical counseling activity, not in retaliation for the professor's speech.[8]

— a city fire department regulation requiring a firefighter summoned to testify before the court or investigating agency to notify the department of the subpoena comported with the First Amendment, since it was not a prior restraint or restriction on speech.[9]



Footnotes

1 Schenck v. Pro-Choice Network Of Western New York, 519 U.S. 357, 117 S. Ct. 855, 137 L. Ed. 2d 1 (1997).

2 Citizens United v. Federal Election Com'n, 558 U.S. 310, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010).

3 Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 98 S. Ct. 1535, 56 L. Ed. 2d 1 (1978).

4 U.S. v. Marchetti, 466 F.2d 1309 (4th Cir. 1972).
5 Terry v. Reno, 101 F.3d 1412 (D.C. Cir. 1996).
6 Free Speech Coalition v. Gonzales, 406 F. Supp. 2d 1196 (D. Colo. 2005).
7 Karpova v. Snow, 402 F. Supp. 2d 459 (S.D. N.Y. 2005), aff'd, 497 F.3d 262 (2d Cir. 2007).
8 Marinoff v. City College of New York, 357 F. Supp. 2d 672, 196 Ed. Law Rep. 237 (S.D. N.Y. 2005).
9 Parow v. Kinnon, 300 F. Supp. 2d 256 (D. Mass. 2004).

End of Document

# 16A Am. Jur. 2d Constitutional Law § 478

**American Jurisprudence, Second Edition** | May 2021 Update

**Constitutional Law**
Barbara J. Van Arsdale, J.D.; James Buchwalter, J.D; Paul M. Coltoff, J.D.; John A. Gebauer, J.D.; Lonnie E. Griffith, Jr., J.D.; Janice Holben, J.D.; Sonja Larsen, J.D.; Lucas Martin, J.D.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Karl Oakes, J.D.; Karen L. Schultz, J.D.; Jeffrey J. Shampo, J.D.; and Kimberly C. Simmons, J.D.

**IX. Fundamental Constitutional Rights and Privileges**

**C. Particular Fundamental Constitutional Rights**

**1. First Amendment Rights Guaranteed by Constitution**

**c. Freedom of Speech and Press**

**(2) Scope of Constitutional Guarantees of Free Speech and Press**

**(b) Freedom from Prior Restraint**

## § 478. Impermissible prior restraints and censorship

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 1499, 1525 to 1528, 1592

Based on the particular circumstances or methods of regulation involved, various governmental or judicial acts have been struck down as impermissible prior restraints or censorship, such as where a threat of prosecution or criminal contempt against a specific publication raises special First Amendment concerns, for it may chill protected speech much like an injunction against speech by putting that party at an added risk of liability.[1]

Similarly, on the basis of the particular circumstances or methods of regulation involved, the courts have held that—

— an injunction issued in a defamation action by an attorney against a former client prohibiting the former client from picketing the attorney and his law office amounted to an overly broad prior restraint upon speech, lacking plausible justification, in light of the attorney's death, since the injunction had lost its underlying rationale; picketing the attorney and his law offices while engaging in the injunction-forbidden speech could no longer achieve the objectives that the trial court had in mind when issuing the injunction, that is, coercing the attorney to pay a tribute for desisting in the activity, although injunctive relief based on present circumstances might still be warranted.[2]

  

— an order of a state employment relations commission prohibiting a school board from allowing employees, other than representatives of the union which had been certified as the majority collective-bargaining representative of teachers in the district, from appearing and speaking at meetings of the board on matters subject to collective bargaining between the board and the union constituted an improper prior restraint upon the First Amendment rights of the teachers, since the order was designed to govern speech and conduct in the future, not to punish past conduct.[3]

— a state court's order enjoining the reporting, prior to publication, of information implicating the accused was too vague and too broad to survive the scrutiny given by the United States Supreme Court to restraints on First Amendment rights.[4]

— the denial of the use of a municipal theater for showing a controversial musical constitutes a prior restraint on free expression, and it is immaterial whether the promoter might have used some other theater since, even if a privately owned forum had been available, that fact alone would not justify an otherwise impermissible prior restraint.[5]

— an injunction against the distribution of leaflets accusing a real estate broker of "panic peddling" activities is unconstitutional as a prior restraint on First Amendment rights.[6]

— a provision of a state parks ordinance that the director may require security if he deems that "the conduct of the meeting may reasonably cause a riot or disturbance" is an impermissible prior restraint on speech and is therefore void under the First Amendment, where the director's ability to deny the applicant's permit or to require that the applicant submit a plan and pay for security if the director foresaw the possibility of a riot or disturbance had to be based on content whereas constitutional permitting schemes had to be content neutral, and there were absolutely no guidelines to determine how much the applicants had to pay to obtain security, as the applicants had to submit a "bid" for security themselves, but there were no minimums or maximums to the fees, creating an endless sliding scale, and no guidelines to inform the director's decision regarding whether a security plan was sufficient.[7]

— parents who were members of an evangelical church stated a claim for violation of their right to freedom of speech by alleging that county officials and employees attempted to bar them from engaging in religious speech, by threatening the removal of children from the parents, by requesting that the pastor lower the tone of her prayer, and by demanding that the parents sign a protection plan forbidding them from engaging in "strong prayer" near the children.[8]



Footnotes

1 Multimedia Holdings Corp. v. Circuit Court of Florida, St. Johns County, 544 U.S. 1301, 125 S. Ct. 1624, 161 L. Ed. 2d 590 (2005).

2 Tory v. Cochran, 544 U.S. 734, 125 S. Ct. 2108, 161 L. Ed. 2d 1042 (2005).

3 City of Madison, Joint School Dist. No. 8 v. Wisconsin Employment Relations Commission, 429 U.S. 167, 97 S. Ct. 421, 50 L. Ed. 2d 376 (1976).

4 Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 96 S. Ct. 2791, 49 L. Ed. 2d 683 (1976).

5 Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 95 S. Ct. 1239, 43 L. Ed. 2d 448 (1975).

6 Organization for a Better Austin v. Keefe, 402 U.S. 415, 91 S. Ct. 1575, 29 L. Ed. 2d 1 (1971).

7 Service Employees Intern. Union v. City of Houston, 542 F. Supp. 2d 617 (S.D. Tex. 2008), aff'd in part, rev'd in part on other grounds and remanded, 595 F.3d 588 (5th Cir. 2010).

8 Words of Faith Fellowship, Inc. v. Rutherford County Dept. of Social Services, 329 F. Supp. 2d 675 (W.D. N.C. 2004).

End of Document

# 16A Am. Jur. 2d Constitutional Law § 479

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**Constitutional Law**
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**IX. Fundamental Constitutional Rights and Privileges**

**C. Particular Fundamental Constitutional Rights**

**1. First Amendment Rights Guaranteed by Constitution**

**c. Freedom of Speech and Press**

**(2) Scope of Constitutional Guarantees of Free Speech and Press**

**(c) Content-Neutral Regulations**

## § 479. Content-neutral regulations, generally

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 1505, 1511 to 1515

**A.L.R. Library**

Validity, Construction, and Application of State Sex Offender Statutes Prohibiting Use of Computers and Internet as Conditions of Probation or Sentence, 89 A.L.R.6th 261

For First Amendment purposes, content-neutral regulations do not pose the same inherent dangers to free expression that content-based regulations do; they are subject to a less rigorous analysis, which affords the government latitude in designing regulatory solutions.[1] The principal inquiry in determining content neutrality is whether the government has adopted a regulation of speech without reference to the content of the regulated speech.[2] Speech-regulating rules are content-neutral for purposes of First Amendment scrutiny when the rule is not related to the subject or topic of the speech.[3] Also, in determining whether the regulation of speech is content-based or content-neutral, the court looks to the purpose behind the regulation; typically,

  

government regulation of expressive activity is content-neutral as long as it is justified without reference to the content of the regulated speech.[4] Moreover, a regulation that serves purposes unrelated to the content of the expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not on others.[5]

A facially neutral law does not become content based, for purposes of a free speech challenge, simply because it may disproportionately affect speech on certain topics.[6]

Content-neutral regulations which address the time, place, and manner of speech are constitutional as long as they are justified without reference to the content of the regulated speech; they are narrowly tailored to serve a significant or substantial governmental interest; and they leave open ample alternative avenues of communication.[7] A law restricting speech on a viewpoint- and content-neutral basis, or a regulation that has an incidental effect on expressive conduct, comports with the First Amendment as long as it withstands intermediate scrutiny, that is, if it furthers an important or substantial government interest; the governmental interest is unrelated to the suppression of free expression; and the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[8] Similarly, content-neutral restrictions on symbolic speech are not overbroad, in violation of the First Amendment, if the restrictions are within the constitutional power of the government; they further an important or substantial governmental interest; the governmental interest is unrelated to the suppression of free expression; and, the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[9] Content-neutral regulation will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech, and does not burden substantially more speech than is necessary to further those interests.[10] Content-neutral restrictions on speech are valid if the government can show a reasonable basis for believing that its policy will indeed further a substantial government interest and that the policy is the least restriction possible which would further that interest.[11]

The listeners' reaction to a speech is not a content-neutral basis for regulation; a speech cannot be punished or banned simply because it might offend those who hear it.[12]

To be content-neutral prior restraints on speech, under the First Amendment, fees and applications for licenses cannot depend on the content of the speech involved.[13]

**CUMULATIVE SUPPLEMENT**

**Cases:**

Content-based laws are subject to strict scrutiny under the Free Speech Clause; by contrast, content-neutral laws are subject to a lower level of scrutiny. (Per Justice Kavanaugh, with three Justices concurring and one Justice concurring in the judgment.) U.S. Const. Amend. 1. Barr v. American Association of Political Consultants, Inc, 140 S. Ct. 2335, 207 L. Ed. 2d 784 (2020).

**[END OF SUPPLEMENT]**



Footnotes

1 Turner Broadcasting System, Inc. v. F.C.C., 520 U.S. 180, 117 S. Ct. 1174, 137 L. Ed. 2d 369 (1997); Able v. U.S., 88 F.3d 1280 (2d Cir. 1996); Crawford v. Lungren, 96 F.3d 380 (9th Cir. 1996).

2 Reed v. Town of Gilbert, Ariz., 576 U.S. 155, 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015); Madsen v. Women's Health Center, Inc., 512 U.S. 753, 114 S. Ct. 2516, 129 L. Ed. 2d 593 (1994); Phillips v. Borough of Keyport, 107 F.3d 164 (3d Cir. 1997).

3 Glendale Associates, Ltd. v. N.L.R.B., 347 F.3d 1145 (9th Cir. 2003).

4 Bartnicki v. Vopper, 531 U.S. 990, 121 S. Ct. 479, 148 L. Ed. 2d 453 (2000).

5 Fraternal Order of Police, N.D. State Lodge v. Stenehjem, 431 F.3d 591 (8th Cir. 2005).

6 McCullen v. Coakley, 573 U.S. 464, 134 S. Ct. 2518, 189 L. Ed. 2d 502 (2014).

7 832 Corp. v. Gloucester Tp., 404 F. Supp. 2d 614 (D.N.J. 2005).

8 Jacobs v. Clark County School Dist., 526 F.3d 419, 232 Ed. Law Rep. 578 (9th Cir. 2008).

9 Vaughn v. St. Helena Parish Police Jury, 365 F. Supp. 2d 763 (M.D. La. 2005).

10 Goldberg v. Cablevision Systems Corp., 281 F. Supp. 2d 595 (E.D. N.Y. 2003).

11 Artistic Entertainment, Inc. v. City of Warner Robins, 331 F.3d 1196, 55 Fed. R. Serv. 3d 1031 (11th Cir. 2003).

12 Ovadal v. City of Madison, Wisconsin, 416 F.3d 531 (7th Cir. 2005).

13 Lamar Advertising Co. v. City of Douglasville, Georgia, 254 F. Supp. 2d 1321 (N.D. Ga. 2003).

**End of Document**

# 16A Am. Jur. 2d Constitutional Law § 480

**American Jurisprudence, Second Edition** | May 2021 Update

**Constitutional Law**

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**IX. Fundamental Constitutional Rights and Privileges**

**C. Particular Fundamental Constitutional Rights**

**1. First Amendment Rights Guaranteed by Constitution**

**c. Freedom of Speech and Press**

**(2) Scope of Constitutional Guarantees of Free Speech and Press**

**(c) Content-Neutral Regulations**

## § 480. Tests to be applied to content-based and content-neutral regulations

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 1506, 1511 to 1518

**A.L.R. Library**

Validity, Construction, and Application of State Sex Offender Statutes Prohibiting Use of Computers and Internet as Conditions of Probation or Sentence, 89 A.L.R.6th 261

The most exacting scrutiny test is applied to regulations that suppress, disadvantage, or impose different burdens upon speech on the basis of its content, and to laws that compel speakers to utter or distribute speech bearing a particular message.[1] Where a statute regulates speech based on its content, it is subject to strict judicial scrutiny,[2] regardless of the government's benign motive,[3] requiring the government to show that it is the least restrictive means of achieving a compelling state interest.[4] Content-based restrictions on speech are subject to the most exacting scrutiny because they pose the inherent risk that the government

  

seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion.[5]

Regulations which permit the government to discriminate on the basis of the content of a speaker's message ordinarily cannot be tolerated under the First Amendment.[6] To survive the strict scrutiny standard as applied to state regulation of speech, the state has the burden of proving that its regulation is narrowly tailored to serve a compelling state interest.[7] Where a law challenged under the First Amendment burdens core political speech, the courts will apply "exacting scrutiny," and uphold the restriction only if it is narrowly tailored to serve an overriding state interest.[8] Under strict scrutiny for a violation of free speech protections, the First Amendment requires a restriction on speech to be narrowly tailored, not perfectly tailored; most problems arise in greater and lesser gradations, and the First Amendment does not confine a state to addressing evils in their most acute form.[9]

Laws that by their terms distinguish favored speech from disfavored speech on the basis of ideas or views expressed are content-based and subject to strict scrutiny under the First Amendment, while laws that confer benefits or impose burdens on speech without reference to ideas or views expressed are in most instances content-neutral.[10] A regulation that serves purposes unrelated to the content of expression is deemed neutral, as opposed to content based.[11] This is so even if it has an incidental effect on some speakers or messages but not others; the question in such a case is whether the law is justified without reference to the content of the regulated speech.[12] Regulations of speech that are regarded as content-neutral receive lesser scrutiny under the First Amendment,[13] reflecting the less substantial risk of excising ideas or viewpoints from public dialogue[14] and this includes regulations that restrict the time, place, and manner of expression in order to ameliorate the undesirable secondary effects of sexually explicit expression.[15]

A content-neutral statute restricting speech must be narrowly tailored to serve a significant governmental interest.[16] For a content-neutral time, place, or manner regulation of speech to be narrowly tailored, it must not burden substantially more speech than is necessary to further the government's legitimate interests, but the government still may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals.[17] The government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier.[18]

Under the test applicable to a free expression challenge where the governmental purpose in enacting the law is unrelated to the suppression of expression, a law passes muster if: the law is within the constitutional power of the government to enact; the law furthers an important or substantial government interest; the government interest is unrelated to the suppression of free expression; and the restriction is no greater than is essential to the furtherance of the government interest.[19] So long as the policy is content neutral, time, place, and manner restrictions on speech need not be the least restrictive or least intrusive means of doing so; rather, the government need only avoid regulating expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals.[20] Stated somewhat differently, in order to survive intermediate scrutiny, a speech regulation must meet three requirements: (1) the government must have had the actual purpose of suppressing secondary effects when it enacted the ordinance; (2) the entity must have had a reasonable evidentiary basis for concluding that its regulation would have the desired effect, which requires that the entity show that the evidence upon which it relied was reasonably believed to be relevant to the problem that the entity sought to address; and (3) the ordinance must leave the quantity and accessibility of speech substantially intact.[21] However, laws that, though facially content neutral, cannot be justified without reference to the content of the regulated speech, or that were adopted by the government because of disagreement with the message the speech conveys, like those laws that are content-based on their face, must satisfy strict scrutiny.[22]

  

**Practice Tip:**

To determine whether a regulation is content-based, in which case a court would apply the strict scrutiny test, or content-neutral, in which case a court would apply the intermediate scrutiny test, a court asks whether the government has adopted the regulation of speech because of its disagreement with the message it conveys or whether the regulation serves purposes unrelated to the content of the expression.[23] The fact that a speech-related distinction is speaker-based or event-based do not automatically render the distinction content-neutral and subject to a lower level of scrutiny than strict scrutiny.[24] Because speech restrictions based on the identity of the speaker are all too often simply a means to control content, laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference.[25] Even if the government may constitutionally impose content-neutral prohibitions on a particular manner of speech, it may not condition that speech on obtaining a license or permit from a government official in that official's boundless discretion.[26]

Because the recipients of government funds allocated pursuant to the Spending Clause retain the ability to reject the funds offered to them, and to not assume any restrictions attached to the funds that they deem unduly burdensome, such conditions are generally subject to less scrutiny in a free speech challenge than legislation imposing direct regulation.[27]

**CUMULATIVE SUPPLEMENT**

**Cases:**

To survive a First Amendment free speech challenge to a content-based restriction, under the strict scrutiny standard, the defendant must show that the law's restriction furthers a compelling governmental interest and is narrowly tailored to that end. U.S. Const. Amend. 1. L.D. Management Company v. Gray, 988 F.3d 836 (6th Cir. 2021).

Under strict scrutiny of content-based restriction of speech, challengers were likely to succeed on merits, as threshold requirement for obtaining preliminary injunction, of First Amendment challenge to current version of state statute criminalizing panhandling and pre-enforcement challenge before effective date of statutory amendment effectively prohibiting all panhandling in urban areas, where state and local officials offered no evidence in support of the compelling government interests that they asserted, and instead they simply stated that individuals might not want to be approached for a solicitation. U.S. Const. Amend. 1; Ind. Code Ann. § 35-45-17-2. Indiana Civil Liberties Union Foundation, Inc. v. Superintendent, Indiana State Police, 470 F. Supp. 3d 888 (S.D. Ind. 2020).

**[END OF SUPPLEMENT]**



Footnotes

1 U.S. v. Alvarez, 567 U.S. 709, 132 S. Ct. 2537, 183 L. Ed. 2d 574 (2012); Turner Broadcasting System, Inc. v. F.C.C., 512 U.S. 622, 114 S. Ct. 2445, 129 L. Ed. 2d 497 (1994).

2 Reed v. Town of Gilbert, Ariz., 576 U.S. 155, 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015); McCullen v. Coakley, 573 U.S. 464, 134 S. Ct. 2518, 189 L. Ed. 2d 502 (2014); Ysursa v. Pocatello Educ. Ass'n, 555 U.S. 353, 129 S. Ct. 1093, 172 L. Ed. 2d 770, 72 A.L.R.6th 751 (2009); U.S. v. Playboy Entertainment Group, Inc., 529 U.S. 803, 120 S. Ct. 1878, 146 L. Ed. 2d 865 (2000); John Doe, Inc. v. Mukasey, 549 F.3d 861 (2d Cir. 2008), as modified on other grounds, (Mar. 26, 2009).

3 Reed v. Town of Gilbert, Ariz., 576 U.S. 155, 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015).

4 National Institute of Family and Life Advocates v. Becerra, 138 S. Ct. 2361, 201 L. Ed. 2d 835 (2018); McCullen v. Coakley, 573 U.S. 464, 134 S. Ct. 2518, 189 L. Ed. 2d 502 (2014); McCutcheon v. Federal Election Com'n, 572 U.S. 185, 134 S. Ct. 1434, 188 L. Ed. 2d 468 (2014); American Civil Liberties Union v. Mukasey, 534 F.3d 181 (3d Cir. 2008); Startzell v. City of Philadelphia, Pennsylvania, 533 F.3d 183 (3d Cir. 2008).

5 Startzell v. City of Philadelphia, Pennsylvania, 533 F.3d 183 (3d Cir. 2008).

6 Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd., 502 U.S. 105, 112 S. Ct. 501, 116 L. Ed. 2d 476 (1991); Crawford v. Lungren, 96 F.3d 380 (9th Cir. 1996).

7 Reed v. Town of Gilbert, Ariz., 576 U.S. 155, 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015); Yes On Term Limits, Inc. v. Savage, 550 F.3d 1023 (10th Cir. 2008).

8 McIntyre v. Ohio Elections Com'n, 514 U.S. 334, 115 S. Ct. 1511, 131 L. Ed. 2d 426 (1995); Michigan State AFL-CIO v. Miller, 103 F.3d 1240, 36 Fed. R. Serv. 3d 397, 1997 FED App. 0002P (6th Cir. 1997); International Caucus of Labor Committees v. City of Montgomery, 111 F.3d 1548 (11th Cir. 1997); People v. Marquan M., 24 N.Y.3d 1, 994 N.Y.S.2d 554, 19 N.E.3d 480, 310 Ed. Law Rep. 1079 (2014).

9 Williams-Yulee v. Florida Bar, 575 U.S. 433, 135 S. Ct. 1656, 191 L. Ed. 2d 570 (2015).

10 Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd., 502 U.S. 105, 112 S. Ct. 501, 116 L. Ed. 2d 476 (1991); Leathers v. Medlock, 499 U.S. 439, 111 S. Ct. 1438, 113 L. Ed. 2d 494 (1991).

11 McCullen v. Coakley, 573 U.S. 464, 134 S. Ct. 2518, 189 L. Ed. 2d 502 (2014).

12 McCullen v. Coakley, 573 U.S. 464, 134 S. Ct. 2518, 189 L. Ed. 2d 502 (2014); Christian Legal Soc. Chapter of the University of California, Hastings College of the Law v. Martinez, 561 U.S. 661, 130 S. Ct. 2971, 177 L. Ed. 2d 838, 57 A.L.R. Fed. 2d 573 (2010).

13 Reed v. Town of Gilbert, Ariz., 576 U.S. 155, 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015); Phillips v. Borough of Keyport, 107 F.3d 164 (3d Cir. 1997); Phelps-Roper v. City of Manchester, Mo., 697 F.3d 678 (8th Cir. 2012); Fraternal Order of Police, N.D. State Lodge v. Stenehjem, 431 F.3d 591 (8th Cir. 2005); Free Speech Coalition v. Gonzales, 406 F. Supp. 2d 1196 (D. Colo. 2005); Pitt County v. Dejavue, Inc., 185 N.C. App. 545, 650 S.E.2d 12 (2007).

14 Turner Broadcasting System, Inc. v. F.C.C., 512 U.S. 622, 114 S. Ct. 2445, 129 L. Ed. 2d 497 (1994); Horton v. City of Houston, Tex., 179 F.3d 188 (5th Cir. 1999); Comcast of California I, Inc. v. City of Walnut Creek, Cal., 371 F. Supp. 2d 1147 (N.D. Cal. 2005).

15 Phillips v. Borough of Keyport, 107 F.3d 164 (3d Cir. 1997).

16 McCullen v. Coakley, 573 U.S. 464, 134 S. Ct. 2518, 189 L. Ed. 2d 502 (2014).

17 McCullen v. Coakley, 573 U.S. 464, 134 S. Ct. 2518, 189 L. Ed. 2d 502 (2014).

18 McCullen v. Coakley, 573 U.S. 464, 134 S. Ct. 2518, 189 L. Ed. 2d 502 (2014).

19 The Tool Box v. Ogden City Corp., 355 F.3d 1236 (10th Cir. 2004); Comcast of California I, Inc. v. City of Walnut Creek, Cal., 371 F. Supp. 2d 1147 (N.D. Cal. 2005).

20 Bloedorn v. Grube, 631 F.3d 1218, 264 Ed. Law Rep. 638, 71 A.L.R.6th 767 (11th Cir. 2011).

21 729, Inc. v. Kenton County Fiscal Court, 515 F.3d 485 (6th Cir. 2008).

22 Reed v. Town of Gilbert, Ariz., 576 U.S. 155, 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015).

23 Procter & Gamble Co. v. Bankers Trust Co., 78 F.3d 219, 1996 FED App. 0076P (6th Cir. 1996).

24 Reed v. Town of Gilbert, Ariz., 576 U.S. 155, 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015).

25 Reed v. Town of Gilbert, Ariz., 576 U.S. 155, 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015) (a law cannot be regarded as protecting an interest of the highest order, and as justifying a restriction on truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited).

26 City of Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750, 108 S. Ct. 2138, 100 L. Ed. 2d 771 (1988).

  

27 Alliance for Open Society Intern., Inc. v. U.S. Agency for Intern. Development, 430 F. Supp. 2d 222 (S.D. N.Y. 2006), aff'd, 651 F.3d 218 (2d Cir. 2011), aff'd, 570 U.S. 205, 133 S. Ct. 2321, 186 L. Ed. 2d 398 (2013).

End of Document

# 16A Am. Jur. 2d Constitutional Law § 481

**American Jurisprudence, Second Edition** | May 2021 Update

**Constitutional Law**
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**IX. Fundamental Constitutional Rights and Privileges**

**C. Particular Fundamental Constitutional Rights**

**1. First Amendment Rights Guaranteed by Constitution**

**c. Freedom of Speech and Press**

**(2) Scope of Constitutional Guarantees of Free Speech and Press**

**(c) Content-Neutral Regulations**

## § 481. Particular content-neutral regulations

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 1505, 1511 to 1515

In consonance with the principle that regulations must generally be content-neutral,[1] the courts have held that—

— a statute, making it a crime to knowingly stand on a public way or sidewalk within 35 feet of an entrance or driveway to any place, other than a hospital, where abortions were performed, was not content-based, so as to be subject to strict scrutiny in free speech challenge, based on fact that it established buffer zones only at clinics that performed abortions as the statute did not draw content-based distinctions on its face, it did not require enforcement authorities to examine the content of the message conveyed in order to determine whether a violation occurred, the stated purposes of the statute including public safety were content neutral, and, because the statute was enacted in response to a problem occurring only at abortion clinics, a limited solution was warranted.[2]

— a restriction imposed by a police officer, barring an antiabortion protester from entering the alley and approaching the patients outside a medical clinic that performed abortions, is content-neutral, for the purpose of First Amendment free speech analysis, since although the protester was treated differently from the clinic personnel, there was no showing that the officer's treatment of the protester was prompted by disagreement with the pro-life message.[3]

  

— a municipal ordinance's prohibition against airborne signs or advertising devices is viewpoint-neutral, for the purpose of First Amendment free speech analysis of aerial advertisement banner-towing above beaches, since the ordinance did not say anything about the content of the signs or views expressed, and although the ordinance had an identifying mark exception, the exception differentiated only as to the medium used for expression, such as identifying marks on the aircraft versus towed banners, and not on the basis of any particular viewpoint.[4]

— a zoning ordinance upon which a city based its denial of a variance allowing a church to operate a proposed daycare center in a residential zone does not violate the church's speech and associational rights under the First Amendment, since the content-neutral zoning ordinance was unrelated to the suppression of speech or assembly and did not burden any more speech or associational rights than necessary to further the city's substantial interest in regulating traffic, noise, and pollution in a residential zone.[5]

— a city's classification of a freeway as a "residential" zoning district, effectively denying a permit to operate a sexually oriented business due to its proposed location within 1,000 feet of the freeway, is a neutral regulation having an incidental effect on business, and does not infringe the permit applicant's First Amendment right to free expression, the court stating that the classification predated the permit application and is not motivated to restrict expression.[6]

— a "street furniture guideline" promulgated by a historical district architectural commission which prohibited, among other things, newspaper vending machines on streets or sidewalks is a content-neutral regulation under a First Amendment analysis, as it is directed at aesthetic concerns and is unrelated to the suppression of ideas.[7]

— a municipal ordinance making it unlawful for any person to picket before or about a residence or dwelling of any individual is content-neutral for First Amendment purposes.[8]

— the application of a regulation barring "campaigning for election to any public office" on postal service sidewalks, to a political candidate who was seeking signatures in support of his candidacy, was not discriminatory, in violation of his rights under the Free Speech Clause of the First Amendment, even though the regulation had not been enforced against other candidates in the past, where there was no evidence that the candidate was disfavored due to his views, and the regulation was content-neutral, the government had a significant interest in setting the proper boundaries around partisan political activity, and an adequate alternative forum was available for the candidate.[9]



Footnotes

1 § 479.

2 McCullen v. Coakley, 573 U.S. 464, 134 S. Ct. 2518, 189 L. Ed. 2d 502 (2014).

3 Snell v. City Of York, Pennsylvania, 564 F.3d 659 (3d Cir. 2009).
A restriction on pedestrian activity in an alley adjacent to a reproductive health clinic was content-neutral, for purposes of determining whether it violated the antiabortion protester's speech rights, in that the sergeant who articulated the restriction to the protester was not motivated by the protester's views, and, although the clinic had contract with the city, the contract did not empower the clinic to direct the sergeant's activities at the clinic. McTernan v. City of York, PA, 564 F.3d 636 (3d Cir. 2009).

4 Center for Bio-Ethical Reform, Inc. v. City and County of Honolulu, 455 F.3d 910 (9th Cir. 2006).

5 Grace United Methodist Church v. City Of Cheyenne, 451 F.3d 643, 65 Fed. R. Serv. 3d 248 (10th Cir. 2006).

6 Baby Dolls Topless Saloons, Inc. v. City of Dallas, Tex., 295 F.3d 471 (5th Cir. 2002).

7 Globe Newspaper Co. v. Beacon Hill Architectural Com'n, 100 F.3d 175 (1st Cir. 1996).

8 Douglas v. Brownell, 88 F.3d 1511 (8th Cir. 1996).

9 Del Gallo v. Parent, 545 F. Supp. 2d 162 (D. Mass. 2008), judgment aff'd in part, 557 F.3d 58 (1st Cir. 2009).

End of Document

# 16A Am. Jur. 2d Constitutional Law § 482

**American Jurisprudence, Second Edition** | May 2021 Update

**Constitutional Law**
Barbara J. Van Arsdale, J.D.; James Buchwalter, J.D; Paul M. Coltoff, J.D.; John A. Gebauer, J.D.; Lonnie E. Griffith, Jr., J.D.; Janice Holben, J.D.; Sonja Larsen, J.D.; Lucas Martin, J.D.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Karl Oakes, J.D.; Karen L. Schultz, J.D.; Jeffrey J. Shampo, J.D.; and Kimberly C. Simmons, J.D.

**IX. Fundamental Constitutional Rights and Privileges**

**C. Particular Fundamental Constitutional Rights**

**1. First Amendment Rights Guaranteed by Constitution**

**c. Freedom of Speech and Press**

**(3) Who is Protected**

**(a) In General**

## § 482. Who holds constitutional right to freedom of speech and press, generally; citizens and aliens

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 1495, 1545, 1584

**A.L.R. Library**

First Amendment Protection for Accountants Subjected to Discharge, Transfer, or Discipline Because of Speech, 24 A.L.R. Fed. 2d 239

The freedoms of speech and of the press are available to all[1] and extend to every citizen.[2] However, the whole point of the First Amendment is to afford individuals protection against infringements on free speech; the First Amendment does not protect the government, even when the government purports to act through legislation reflecting "collective speech."[3]

The freedom of speech and of the press are also accorded to aliens residing in this country.[4]

The scope of the freedom of speech and of the press is not narrower because the right is exercised by a naturalized citizen, even though he or she expresses views which may collide with cherished American ideals.[5]

The First Amendment's protection against governmental abridgement of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion.[6]



Footnotes

1 Nevens v. City of Chino, 233 Cal. App. 2d 775, 44 Cal. Rptr. 50 (5th Dist. 1965) (the principle of the freedom of the press may be invoked by anyone in the country; it is not necessary that such person be a newspaper reporter).

2 Wingate v. Gage County School Dist., No. 34, 528 F.3d 1074, 233 Ed. Law Rep. 524 (8th Cir. 2008).

3 McCutcheon v. Federal Election Com'n, 572 U.S. 185, 134 S. Ct. 1434, 188 L. Ed. 2d 468 (2014).

4 Edwards v. Johnson, 209 F.3d 772 (5th Cir. 2000); American-Arab Anti-Discrimination Committee v. Reno, 70 F.3d 1045 (9th Cir. 1995).
Generally, as to the constitutional rights of aliens, see Am. Jur. 2d, Aliens and Citizens §§ 1823 to 1865.

5 Baumgartner v. U.S., 322 U.S. 665, 64 S. Ct. 1240, 88 L. Ed. 1525 (1944).

6 Buckley v. Valeo, 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976).

**End of Document**

# 16A Am. Jur. 2d Constitutional Law § 483

**American Jurisprudence, Second Edition** | May 2021 Update

**Constitutional Law**
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**IX. Fundamental Constitutional Rights and Privileges**

**C. Particular Fundamental Constitutional Rights**

**1. First Amendment Rights Guaranteed by Constitution**

**c. Freedom of Speech and Press**

**(3) Who is Protected**

**(a) In General**

## § 483. Anonymous publisher or author as having right to freedom of speech and press

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 1581

**A.L.R. Library**

First Amendment Protection Afforded to Blogs and Bloggers, 35 A.L.R.6th 407

The right to engage in anonymous speech, particularly anonymous political or religious speech, is an aspect of the freedom of speech protected by the First Amendment,[1] and this is true whether the speech occurs online or offline.[2] Speech is "chilled" when an individual whose speech relies on anonymity is forced to reveal his identity as a precondition to expression.[3] An author's decision to remain anonymous, whether motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible, is an aspect of the freedom of speech protected by the First Amendment.[4] The prohibition on false routing information in the dissemination of e-mails infringes on the protected First Amendment right to engage in anonymous speech.[5]

  

In the absence of some countervailing reason that will pass the highest possible strict scrutiny test, anonymous publications are entitled to protection under the First Amendment, particularly in view of the fact that anonymous pamphleteering played such an important role in the creation of the United States itself. Under the Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice but an honorable tradition of advocacy and of dissent, and anonymity is a shield from the tyranny of the majority.[6] Anonymity has sometimes been assumed for the most constructive purposes, and anonymous pamphlets, leaflets, and books have played an important role in the progress of humankind. The fear of identification and reprisal might deter a perfectly peaceful discussion of public matters of importance.[7]

Freedom under the First Amendment to publish anonymously extends beyond the literary realm to the advocacy of political causes. Core political speech protected by the First Amendment need not only center on a candidate for office but also extend to issue-based elections.[8] A state statute making it a misdemeanor to publish anonymous political campaign literature designed to injure or defeat any candidate for nomination or office is invalid in that it unconstitutionally infringes upon the right of free speech.[9] Also, proposed legislation making it a crime for any daily or weekly newspaper in the state to publish an editorial without disclosing the name of the person who wrote the editorial constitutes an abridgment of freedom of speech or freedom of the press in violation of the First Amendment to the United States Constitution made applicable to the states by the 14th Amendment.[10]

The anonymity of an author is not ordinarily a sufficient reason to exclude his or her work product from the protections of the First Amendment. The author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of freedom of speech protected by the First Amendment. Since freedom under the First Amendment to publish anonymously extends beyond the literary realm to the advocacy of political causes, a state's statutory prohibition against the distribution of anonymous campaign literature cannot be justified under the First Amendment as a means of preventing the dissemination of untruths, where the statute contains no language limiting its application to fraudulent, false, or libelous statements.[11]

**Practice Tip:**

The First Amendment does not prohibit a "confidential source" from recovering damages under promissory estoppel law for newspaper publishers' breach of the promise of confidentiality in exchange for the information. The doctrine of promissory estoppel is a law of general applicability, and any inhibition of truthful reporting is no more than an incidental consequence of applying the generally applicable law.[12]



Footnotes

1 Novak v. City of Parma, 932 F.3d 421 (6th Cir. 2019); Calzone v. Summers, 942 F.3d 415 (8th Cir. 2019); Ex parte Bradshaw, 501 S.W.3d 665 (Tex. App. Dallas 2016), petition for discretionary review refused, (Dec. 7, 2016); Jaynes v. Commonwealth, 276 Va. 443, 666 S.E.2d 303 (2008).

2 In re Grand Jury Subpoena, No. 16-03-217, 875 F.3d 1179 (9th Cir. 2017).

3 State v. Aschbrenner, 926 N.W.2d 240 (Iowa 2019).

4 State v. Mixton, 247 Ariz. 212, 447 P.3d 829 (Ct. App. Div. 2 2019), review granted, (Nov. 19, 2019).

5 Jaynes v. Commonwealth, 276 Va. 443, 666 S.E.2d 303 (2008).

6 McIntyre v. Ohio Elections Com'n, 514 U.S. 334, 115 S. Ct. 1511, 131 L. Ed. 2d 426 (1995).

7 Talley v. California, 362 U.S. 60, 80 S. Ct. 536, 4 L. Ed. 2d 559 (1960); Huntley v. Public Utilities Commission, 69 Cal. 2d 67, 69 Cal. Rptr. 605, 442 P.2d 685 (1968).

8 McIntyre v. Ohio Elections Com'n, 514 U.S. 334, 115 S. Ct. 1511, 131 L. Ed. 2d 426 (1995).

9 Canon v. Justice Court for Lake Valley Jud. Dist. of El Dorado County, 61 Cal. 2d 446, 39 Cal. Rptr. 228, 393 P.2d 428 (1964).

10 Opinion of The Justices, 306 A.2d 18 (Me. 1973).

11 McIntyre v. Ohio Elections Com'n, 514 U.S. 334, 115 S. Ct. 1511, 131 L. Ed. 2d 426 (1995).

12 Cohen v. Cowles Media Co., 501 U.S. 663, 111 S. Ct. 2513, 115 L. Ed. 2d 586 (1991).

**End of Document**

# 16A Am. Jur. 2d Constitutional Law § 484

**American Jurisprudence, Second Edition** | May 2021 Update

**Constitutional Law**

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**IX. Fundamental Constitutional Rights and Privileges**

**C. Particular Fundamental Constitutional Rights**

**1. First Amendment Rights Guaranteed by Constitution**

**c. Freedom of Speech and Press**

**(3) Who is Protected**

**(a) In General**

## § 484. Corporations and other associations of people as having right to freedom of speech and press

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 1495, 1545, 1600

Political speech does not lose First Amendment protection simply because its source is a corporation and the government may not, under the First Amendment, suppress political speech on the basis of the speaker's corporate identity.[1]

Associations of individuals, such as labor unions,[2] political action committees,[3] and corporations[4] are entitled to enjoy the constitutional rights of free speech and of the press as well as individuals, since the inherent worth of speech in terms of its capacity for informing the public does not depend upon the identity of the source, whether corporation, association, union, or individual.[5]

The speech of heavily regulated businesses, such as public utility companies, enjoys constitutional protection; the utility's position as a regulated monopoly does not decrease the informative value of its opinions on critical public matters.[6]

  

Business entities have no First Amendment right to combine operations or coordinate market activities for the purpose of obtaining a greater market share for each participant, and the fact that communication serves as the primary instrument of conducting business among separate enterprises does not alter this conclusion.[7]



Footnotes

1 Citizens United v. Federal Election Com'n, 558 U.S. 310, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010).

2 Bowe v. Secretary of the Com., 320 Mass. 230, 69 N.E.2d 115, 167 A.L.R. 1447 (1946).

3 Federal Election Com'n v. National Conservative Political Action Committee, 470 U.S. 480, 105 S. Ct. 1459, 84 L. Ed. 2d 455 (1985).

4 Citizens United v. Federal Election Com'n, 558 U.S. 310, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010); Federal Election Com'n v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 107 S. Ct. 616, 93 L. Ed. 2d 539 (1986).

5 Consolidated Edison Co. of New York, Inc. v. Public Service Commission of New York, 447 U.S. 530, 100 S. Ct. 2326, 65 L. Ed. 2d 319 (1980); First Nat. Bank of Boston v. Bellotti, 435 U.S. 765, 98 S. Ct. 1407, 55 L. Ed. 2d 707 (1978).

6 Consolidated Edison Co. of New York, Inc. v. Public Service Commission of New York, 447 U.S. 530, 100 S. Ct. 2326, 65 L. Ed. 2d 319 (1980).

7 Wine and Spirits Retailers, Inc. v. Rhode Island, 418 F.3d 36 (1st Cir. 2005).

**End of Document**

**16A Am. Jur. 2d Constitutional Law § 485**

**American Jurisprudence, Second Edition** | May 2021 Update

**Constitutional Law**

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**IX. Fundamental Constitutional Rights and Privileges**

**C. Particular Fundamental Constitutional Rights**

**1. First Amendment Rights Guaranteed by Constitution**

**c. Freedom of Speech and Press**

**(3) Who is Protected**

**(a) In General**

# § 485. Mass media, artists, and entertainers as having right to freedom of speech and press

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 1495, 1545, 1885 to 1901, 2125 to 2142

**A.L.R. Library**

Artist's speech and due process rights in artistic production which has been sold to another, 93 A.L.R. Fed. 912

Since radio and television broadcasters are engaged in a vital and independent form of communicative activity such that the First Amendment must inform and give shape to the manner in which Congress exercises its regulatory power in this area, they are entitled under the First Amendment to exercise the widest journalistic freedom consistent with their public duties.[1] For purposes of First Amendment analysis, when a public broadcaster exercises editorial discretion in the selection and presentation of its programming, it engages in speech activity; although programming decisions often involve the compilation of the speech of third parties, the decisions nonetheless constitute communicative acts.[2] Although public broadcasting as a general matter does not lend itself to First Amendment scrutiny under the forum doctrine, debates among candidates for political office present the

  

narrow exception to the rule.[3] Accordingly, under the First Amendment, a broadcaster cannot grant or deny access to a debate among candidates for political office on the basis of whether it agrees with a candidate's views; viewpoint discrimination in that context would present not a calculated risk but an inevitability of skewing the electoral dialogue.[4] However, in most cases, the First Amendment of its own force does not compel public broadcasters to allow third parties access to their programming.[5]

Likewise entitled to freedom of speech and of the press are artists and musicians,[6] and even inspirational T-shirt sellers.[7]

**Observation:**

A statute requiring the Chairperson of the National Endowment for the Arts (NEA) to ensure that artistic excellence and artistic merit are criteria by which grant applications are judged, taking into consideration general standards of "decency and respect" for the diverse beliefs and values of the American public, does not inherently interfere with the First Amendment rights of free expression so as to be facially invalid.[8] Moreover, such a statute is not unconstitutionally vague in violation of the First and Fifth Amendments, since the statute involves selective subsidies rather than any criminal or regulatory prohibitions, and it merely adds some imprecise considerations to an already subjective selection process.[9]



Footnotes

1 Arkansas Educ. Television Com'n v. Forbes, 523 U.S. 666, 118 S. Ct. 1633, 140 L. Ed. 2d 875 (1998); F.C.C. v. League of Women Voters of California, 468 U.S. 364, 104 S. Ct. 3106, 82 L. Ed. 2d 278, 39 Fed. R. Serv. 2d 389 (1984).

2 Arkansas Educ. Television Com'n v. Forbes, 523 U.S. 666, 118 S. Ct. 1633, 140 L. Ed. 2d 875 (1998).

3 Arkansas Educ. Television Com'n v. Forbes, 523 U.S. 666, 118 S. Ct. 1633, 140 L. Ed. 2d 875 (1998).

4 Arkansas Educ. Television Com'n v. Forbes, 523 U.S. 666, 118 S. Ct. 1633, 140 L. Ed. 2d 875 (1998).

5 Arkansas Educ. Television Com'n v. Forbes, 523 U.S. 666, 118 S. Ct. 1633, 140 L. Ed. 2d 875 (1998).

6 Ward v. Rock Against Racism, 491 U.S. 781, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989).

7 One World One Family Now v. City and County of Honolulu, 76 F.3d 1009 (9th Cir. 1996) (nonprofit groups' activities in selling T-shirts imprinted with various philosophical and inspirational messages are protected by the First Amendment).

8 National Endowment for the Arts v. Finley, 524 U.S. 569, 118 S. Ct. 2168, 141 L. Ed. 2d 500 (1998).

9 National Endowment for the Arts v. Finley, 524 U.S. 569, 118 S. Ct. 2168, 141 L. Ed. 2d 500 (1998).

**End of Document**

**16A Am. Jur. 2d Constitutional Law § 486**

**American Jurisprudence, Second Edition** | May 2021 Update

**Constitutional Law**
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**IX. Fundamental Constitutional Rights and Privileges**

**C. Particular Fundamental Constitutional Rights**

**1. First Amendment Rights Guaranteed by Constitution**

**c. Freedom of Speech and Press**

**(3) Who is Protected**

**(a) In General**

# § 486. Minors, students, and teachers as having right to freedom of speech

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 1546 to 1549, 1965, 1973, 1975 to 1981, 1985 to 1987, 2009 to 2011, 2015

Minors are entitled to a significant measure of First Amendment protection.[1] Limitations on a minor's access to violent expression are subject to strict scrutiny in the First Amendment context; however, even under strict scrutiny analysis, the court must consider the potential harm to a child that is being addressed by legislation which limits a child's access to expression.[2] Speech within the rights of adults to hear may not be silenced completely in an attempt to shield children from it.[3] While states no doubt possess legitimate power to protect children from harm, that power does not include a free-floating power to restrict ideas to which children may be exposed.[4]

Public universities have a compelling interest in promoting student expression in a manner that is viewpoint-neutral.[5] While public school students do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate, the students' First Amendment rights in schools are not automatically coextensive with the rights of adults in other settings and must be applied in light of the special characteristics of the school environment,[6] and such students' First Amendment rights in schools must be balanced against society's countervailing interest in teaching students the boundaries of socially appropriate behavior.[7]

  

A bulletin board in a public high school on which materials relating to the school's gay and lesbian awareness month are posted constitutes speech attributable to the school district and the school board, through enforcement of the district and board policy by the school principal, rather than individual speech sponsored by the school or had received its imprimatur, as would require viewpoint neutrality on the part of the school in allowing postings under the First Amendment, and a teacher seeking to post materials reflecting a differing viewpoint has no First Amendment right to dictate or contribute to the speech contained on the bulletin board.[8] Also, a school board's termination of a teacher for permitting students to use profanity in plays and poetry does not violate the teacher's right to free speech, under the First Amendment, where the teacher had notice that the use of profanity in creative writing is prohibited, and the school district has a legitimate academic interest in prohibiting profanity.[9] Similarly, a state university's denial of secondary education student's application to become a student teacher, based on his comments regarding the acceptability of child predation by adults and regarding his belief that disabled students should not be taught by secondary school teachers, was directly related to defined and established professional standards, and did not violate the student's First Amendment free speech rights.[10]

A school principal's purported silence on the issue of the location of the school district's alternative education program is not entitled to First Amendment protection, absent either a demand for speech or evidence that the principal intended her silence to constitute expression.[11]

Speech which is prescribed as part of an official school curriculum in connection with a classroom exercise is a "school-sponsored speech" for free speech purposes, and school officials may place restrictions on such speech as long as they are reasonably related to legitimate pedagogical concerns.[12] For purposes of determining whether high school officials violated a student's First Amendment right to free speech by prohibiting him from reciting a poem that contained the words "hell" and "damn," the student's recitation of the poem has been deemed not school-sponsored speech where the competition for which the student recited the poem was a noncurricular activity that was only partially supervised by school officials.[13]

A state university has a right to exclude First Amendment activities that violate reasonable campus rules or substantially interfere with the opportunity of other students to obtain an education.[14] However, a university cannot use a code of ethics as a pretext for punishing a student's protected speech.[15]

A state university thesis committee's refusal to approve a graduate student's master's thesis based on a nonconforming "Disacknowledgements" section, and the academic consequences flowing therefrom, does not violate the student's First Amendment rights.[16]

The First Amendment permits a public university to charge its students an activity fee used to fund a program to facilitate extracurricular student speech, but objecting students may insist upon certain safeguards with respect to the expressive activities which they are required to support, and the proper measure, and the principal standard of protection for objecting students, is the requirement of viewpoint neutrality in the allocation of funding support; the standard is not whether the student speech is germane to the purposes of the university.[17] In upholding a state university's mandatory student activity fee used to facilitate extracurricular student speech which some students may find objectionable, if the program is viewpoint-neutral, there is no distinction between campus activities and the off-campus expressive activities of objectionable organizations; the university is free to enact viewpoint-neutral rules restricting off-campus travel or other expenditures by funded organizations, but there appears to be no principled way to impose upon the university, as a constitutional matter, a requirement to adopt geographic or spatial restrictions as a condition for the organizations' entitlement to reimbursement.[18]

Footnotes

1 Erznoznik v. City of Jacksonville, 422 U.S. 205, 95 S. Ct. 2268, 45 L. Ed. 2d 125 (1975); Video Software Dealers Ass'n v. Schwarzenegger, 401 F. Supp. 2d 1034 (N.D. Cal. 2005).

2 Video Software Dealers Ass'n v. Schwarzenegger, 401 F. Supp. 2d 1034 (N.D. Cal. 2005).

3 Ashcroft v. Free Speech Coalition, 535 U.S. 234, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002).

4 Brown v. Entertainment Merchants Ass'n, 564 U.S. 786, 131 S. Ct. 2729, 180 L. Ed. 2d 708 (2011) (speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that legislative body thinks unsuitable for them).

5 Harris v. Quinn, 573 U.S. 616, 134 S. Ct. 2618, 189 L. Ed. 2d 620 (2014).

6 Axson-Flynn v. Johnson, 356 F.3d 1277, 184 Ed. Law Rep. 702 (10th Cir. 2004).
As to the free speech rights of students in elementary or high schools, see Am. Jur. 2d, Schools §§ 301 to 308.

7 Lacks v. Ferguson Reorganized School Dist. R-2, 147 F.3d 718, 127 Ed. Law Rep. 568 (8th Cir. 1998).
A high school student's loud reference to an assistant principal as a "dick" after he took away the student's unopened food and refused to give it back immediately was not protected by the First Amendment since the statement was insubordinate speech directed toward a school official and did not concern a political issue or a matter of public concern but instead was directed at a private grievance. Posthumus v. Board of Educ. of Mona Shores Public Schools, 380 F. Supp. 2d 891, 201 Ed. Law Rep. 184 (W.D. Mich. 2005).

8 Downs v. Los Angeles Unified School Dist., 228 F.3d 1003, 147 Ed. Law Rep. 855 (9th Cir. 2000).

9 Lacks v. Ferguson Reorganized School Dist. R-2, 147 F.3d 718, 127 Ed. Law Rep. 568 (8th Cir. 1998).

10 Oyama v. University of Hawaii, 813 F.3d 850, 327 Ed. Law Rep. 569 (9th Cir. 2015).

11 Jones v. Collins, 132 F.3d 1048, 122 Ed. Law Rep. 1223 (5th Cir. 1998).

12 Axson-Flynn v. Johnson, 356 F.3d 1277, 184 Ed. Law Rep. 702 (10th Cir. 2004).

13 Behymer-Smith ex rel. Behymer v. Coral Academy of Science, 427 F. Supp. 2d 969, 209 Ed. Law Rep. 211 (D. Nev. 2006).

14 Widmar v. Vincent, 454 U.S. 263, 102 S. Ct. 269, 70 L. Ed. 2d 440, 1 Ed. Law Rep. 13 (1981).

15 Tatro v. University of Minnesota, 816 N.W.2d 509, 281 Ed. Law Rep. 1224 (Minn. 2012).

16 Brown v. Li, 308 F.3d 939, 170 Ed. Law Rep. 463 (9th Cir. 2002).

17 Board of Regents of University of Wisconsin System v. Southworth, 529 U.S. 217, 120 S. Ct. 1346, 146 L. Ed. 2d 193, 142 Ed. Law Rep. 624 (2000).

18 Board of Regents of University of Wisconsin System v. Southworth, 529 U.S. 217, 120 S. Ct. 1346, 146 L. Ed. 2d 193, 142 Ed. Law Rep. 624 (2000).

End of Document

# 16A Am. Jur. 2d Constitutional Law § 487

**American Jurisprudence, Second Edition** | May 2021 Update

**Constitutional Law**
Barbara J. Van Arsdale, J.D.; James Buchwalter, J.D; Paul M. Coltoff, J.D.; John A. Gebauer, J.D.; Lonnie E. Griffith, Jr., J.D.; Janice Holben, J.D.; Sonja Larsen, J.D.; Lucas Martin, J.D.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Karl Oakes, J.D.; Karen L. Schultz, J.D.; Jeffrey J. Shampo, J.D.; and Kimberly C. Simmons, J.D.

**IX. Fundamental Constitutional Rights and Privileges**

**C. Particular Fundamental Constitutional Rights**

**1. First Amendment Rights Guaranteed by Constitution**

**c. Freedom of Speech and Press**

**(3) Who is Protected**

**(a) In General**

## § 487. Government speech as affected by First Amendment

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 1680, 1681, 1686

**Trial Strategy**

Equal Opportunity for Broadcast Time for Political Candidates, 78 Am. Jur. Proof of Facts 3d 1

The First Amendment prohibits Congress and other government entities and actors from abridging the freedom of speech; the First Amendment does not say that Congress and other government entities must abridge their own ability to speak freely.[1] The Free Speech Clause does not regulate government speech[2] and the Government's own speech is exempt from First Amendment scrutiny.[3] For example, Texas specialty license plate designs were government speech, and a state motor vehicle board did not violate a nonprofit organization's free speech rights by denying its application for a design with a Confederate flag as license plates had long conveyed messages from states as well as serving governmental purposes of vehicle registration and identification, the public closely identified Texas license plate designs with the state, such that displaying the message on license

plate was likely intended to convey the state's endorsement, and Texas maintained direct control over messages conveyed on specialty plates.[4]

The First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others,[5] but imposing a requirement of viewpoint neutrality on government speech would be paralyzing. When a government entity embarks on a course of action, it necessarily takes a particular viewpoint and rejects others. The Free Speech Clause does not require government to maintain viewpoint neutrality when its officers and employees speak about that venture.[6]

**Observation:**

While the government-speech doctrine is important-indeed, essential-it is a doctrine that is susceptible to dangerous misuse. If private speech could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints.[7]



Footnotes

1 Matal v. Tam, 137 S. Ct. 1744, 198 L. Ed. 2d 366 (2017).

2 Pleasant Grove City, Utah v. Summum, 555 U.S. 460, 129 S. Ct. 1125, 172 L. Ed. 2d 853 (2009).

3 Walker v. Texas Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 135 S. Ct. 2239, 192 L. Ed. 2d 274 (2015) (when government speaks, it is not barred by the Free Speech Clause from determining the content of what it says); Board of Regents of University of Wisconsin System v. Southworth, 529 U.S. 217, 120 S. Ct. 1346, 146 L. Ed. 2d 193, 142 Ed. Law Rep. 624 (2000).

4 Walker v. Texas Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 135 S. Ct. 2239, 192 L. Ed. 2d 274 (2015).

5 Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384, 113 S. Ct. 2141, 124 L. Ed. 2d 352, 83 Ed. Law Rep. 30 (1993).

6 Matal v. Tam, 137 S. Ct. 1744, 198 L. Ed. 2d 366 (2017).

7 Matal v. Tam, 137 S. Ct. 1744, 198 L. Ed. 2d 366 (2017).

# 16A Am. Jur. 2d Constitutional Law § 488

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**IX. Fundamental Constitutional Rights and Privileges**

**C. Particular Fundamental Constitutional Rights**

**1. First Amendment Rights Guaranteed by Constitution**

**c. Freedom of Speech and Press**

**(3) Who is Protected**

**(a) In General**

## § 488. Politicians and candidates for public offices as having right to freedom of speech

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 1680, 1681, 1686

**Trial Strategy**

Equal Opportunity for Broadcast Time for Political Candidates, 78 Am. Jur. Proof of Facts 3d 1

The First Amendment has its fullest and most urgent application precisely to the conduct of campaigns for political office.[1] Political speech is at the core of what the First Amendment is designed to protect[2] and a debate on the qualifications of candidates is at the core of the electoral process and of the First Amendment freedoms.[3] The manifest function of the First Amendment in a representative government requires that legislators be given the widest possible latitude to express their views on issues of policy, and a state may not apply to its legislators stricter standards than it applies to its citizens as to the protection afforded by the free speech guarantee of the First Amendment.[4] Also, a candidate for public office, no less than any other person, has a First

Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his or her own election and the election of other candidates.[5] The First Amendment protects political campaign speech despite popular opposition.[6]

Although not beyond restraint, strict scrutiny is applied to any regulation that would curtail political speech.[7] Under the First Amendment, a state may restrict the speech of a judicial candidate only if the restriction is narrowly tailored to serve a compelling interest.[8] In order for a party challenging the content-based restriction of speech by candidates for public office to show that the restriction is narrowly tailored under the strict scrutiny test, the party must demonstrate that the restriction does not unnecessarily circumscribe protected expression.[9] If a law that restricts political speech does not avoid unnecessary abridgement of First Amendment rights, it cannot survive rigorous review.[10]

The "announce clause" in a state Supreme Court's canon of judicial conduct, prohibiting candidates for judicial election from announcing their views on disputed legal or political issues, violates the First Amendment where the clause prohibits speech on the basis of content and burdened the speech of political candidates, a category of speech at the core of First Amendment freedoms.[11] On the other hand, a state's interest in minimizing partisanship in judicial elections is sufficient to justify any minimal burden imposed by a statute precluding judicial candidates from being associated with their political parties on the general-election ballot, on the rights of political party, judicial candidates, and voters to freedom of expression and association in judicial elections.[12] A state's greater power to dispense with the elections of judges altogether does not include the lesser power to conduct such elections under conditions of state-imposed voter ignorance by restricting candidate speech; if the state chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process the First Amendment rights that attach to their roles.[13]

**CUMULATIVE SUPPLEMENT**

**Cases:**

Governor's executive order that prohibited gatherings greater than 50 people, but exempted the free exercise of religion, in an effort to stem the spread of COVID-19 was a content-based restriction, and therefore strict scrutiny applied under traditional First Amendment analysis to claim by organizations affiliated with Republican Party that order violated their rights to freedom of speech; order encouraged, rather than required, religious organizations to follow the recommended guidelines and practices, order was endorsing religious expression compared to other forms of expression, and to determine whether a gathering would violate the order, authorities must look to the content of message communicated to see if the content was religious or not. U.S. Const. Amend. 1. Illinois Republican Party v. Pritzker, 470 F. Supp. 3d 813 (N.D. Ill. 2020), injunction pending appeal denied, (7th Cir. 20-2175)(July 3, 2020) and aff'd, 973 F.3d 760 (7th Cir. 2020).

**[END OF SUPPLEMENT]**



Footnotes

1 McCutcheon v. Federal Election Com'n, 572 U.S. 185, 134 S. Ct. 1434, 188 L. Ed. 2d 468 (2014).

2 In re Attorney General's "Directive on Exit Polling: Media and Non-Partisan Public Interest Groups," issued July 18, 2007, 200 N.J. 283, 981 A.2d 64 (2009).

3 Arizona Free Enterprise Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 131 S. Ct. 2806, 180 L. Ed. 2d 664 (2011); Republican Party of Minnesota v. White, 536 U.S. 765, 122 S. Ct. 2528, 153 L. Ed. 2d 694 (2002).

4 Bond v. Floyd, 385 U.S. 116, 87 S. Ct. 339, 17 L. Ed. 2d 235 (1966).

As to freedom of legislative debate, see § 474.

5 Buckley v. Valeo, 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976).

6 McCutcheon v. Federal Election Com'n, 572 U.S. 185, 134 S. Ct. 1434, 188 L. Ed. 2d 468 (2014), further providing that the First Amendment requires courts to err on the side of protecting political speech rather than suppressing it.

7 281 Care Committee v. Arneson, 766 F.3d 774 (8th Cir. 2014); Sanders County Republican Cent. Committee v. Bullock, 698 F.3d 741 (9th Cir. 2012).

8 Williams-Yulee v. Florida Bar, 575 U.S. 433, 135 S. Ct. 1656, 191 L. Ed. 2d 570 (2015); Republican Party of Minnesota v. White, 536 U.S. 765, 122 S. Ct. 2528, 153 L. Ed. 2d 694 (2002).

9 Republican Party of Minnesota v. White, 536 U.S. 765, 122 S. Ct. 2528, 153 L. Ed. 2d 694 (2002).

10 McCutcheon v. Federal Election Com'n, 572 U.S. 185, 134 S. Ct. 1434, 188 L. Ed. 2d 468 (2014).

11 Republican Party of Minnesota v. White, 536 U.S. 765, 122 S. Ct. 2528, 153 L. Ed. 2d 694 (2002).

12 Ohio Council 8 American Federation of State v. Husted, 814 F.3d 329 (6th Cir. 2016).

13 Republican Party of Minnesota v. White, 536 U.S. 765, 122 S. Ct. 2528, 153 L. Ed. 2d 694 (2002).

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# 16A Am. Jur. 2d Constitutional Law § 489

**American Jurisprudence, Second Edition** | May 2021 Update

**Constitutional Law**
Barbara J. Van Arsdale, J.D.; James Buchwalter, J.D; Paul M. Coltoff, J.D.; John A. Gebauer, J.D.; Lonnie E. Griffith, Jr., J.D.; Janice Holben, J.D.; Sonja Larsen, J.D.; Lucas Martin, J.D.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Karl Oakes, J.D.; Karen L. Schultz, J.D.; Jeffrey J. Shampo, J.D.; and Kimberly C. Simmons, J.D.

**IX. Fundamental Constitutional Rights and Privileges**

**C. Particular Fundamental Constitutional Rights**

**1. First Amendment Rights Guaranteed by Constitution**

**c. Freedom of Speech and Press**

**(3) Who is Protected**

**(a) In General**

## § 489. Politicians and candidates for public offices as having a right to freedom of speech—Campaign financing

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 1680, 1681, 1686

**Trial Strategy**

Equal Opportunity for Broadcast Time for Political Candidates, 78 Am. Jur. Proof of Facts 3d 1

Campaign contributions and campaign expenditures constitute "speech" within the protection of the First Amendment.[1] Exacting scrutiny is necessary when compelled disclosure of campaign-related payments is at issue in order to protect First Amendment right to freedom of speech; such regulations must be substantially related to important governmental interests.[2] Moreover, restrictions on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression, implicating the First Amendment.[3]

  

A state lacked any compelling state interest in leveling or equalizing electoral funding, and such interest could not justify, under the First Amendment, the substantial burden on political speech imposed by the matching funds provision of a state statute, pursuant to which, after privately financed candidate has raised or spent threshold amount, each dollar spent by privately financed candidate triggered direct payment of public money of almost one additional dollar to publicly financed opponents.[4]

The "Millionaires' Amendment" of the Bipartisan Campaign Reform Act (BCRA), relaxing limits on the ability of an opponent of a self-financed House of Representatives candidate to raise money from donors and coordinate campaign spending with party committees, violates the First Amendment on its face by burdening the free exercise of political speech, where the BCRA Amendment raised the limits only for nonself-financing candidates and only when the self-financing candidate's expenditure of personal funds exceeded the $350,000 limit, so that the amendment effectively penalizes the self-financed candidate's ability to use his or her personal funds to finance campaign speech, and produces fundraising advantages for his or her opponents, without any compelling state interest.[5] Likewise, a state campaign finance statute's expenditure limits on the amounts that candidates for state office can spend on their campaigns violates the First Amendment free speech protections.[6] On the other hand, the provision of a state's Campaign Finance Disclosure Act requiring those who make any expenditure for the purpose of supporting, opposing, or otherwise influencing the nomination or election of a person to a public office, other than an expenditure to or from a candidate or to or from a political committee, to file a report if that expenditure exceeds $500, is not unconstitutional on its face, as violating free speech rights guaranteed by the First Amendment, but only if the word "expenditure" were interpreted to apply only to expenditures used for communications expressly advocating the election or defeat of a clearly identified candidate, as opposed to issue advocacy.[7]



Footnotes

1 Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 110 S. Ct. 1391, 108 L. Ed. 2d 652 (1990) (overruled on other grounds by, Citizens United v. Federal Election Com'n, 558 U.S. 310, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010)); Hispanic Leadership Fund, Inc. v. Federal Election Com'n, 897 F. Supp. 2d 407 (E.D. Va. 2012).

2 Citizens in Charge v. Brunner, 689 F. Supp. 2d 992 (S.D. Ohio 2010).

3 Arizona Free Enterprise Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 131 S. Ct. 2806, 180 L. Ed. 2d 664 (2011).

4 Arizona Free Enterprise Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 131 S. Ct. 2806, 180 L. Ed. 2d 664 (2011).

5 Davis v. Federal Election Com'n, 554 U.S. 724, 128 S. Ct. 2759, 171 L. Ed. 2d 737 (2008).

6 Randall v. Sorrell, 548 U.S. 230, 126 S. Ct. 2479, 165 L. Ed. 2d 482, 19 A.L.R. Fed. 2d 659 (2006).

7 Center for Individual Freedom v. Carmouche, 449 F.3d 655 (5th Cir. 2006).

**16A Am. Jur. 2d Constitutional Law § 490**

**American Jurisprudence, Second Edition** | May 2021 Update

**Constitutional Law**

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**IX. Fundamental Constitutional Rights and Privileges**

**C. Particular Fundamental Constitutional Rights**

**1. First Amendment Rights Guaranteed by Constitution**

**c. Freedom of Speech and Press**

**(3) Who is Protected**

**(a) In General**

# § 490. Professional fundraisers as having right to freedom of speech and press; charitable solicitations

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 1870 to 1880

The solicitation of funds and the dissemination of knowledge for and with reference to a worthy charitable organization are within the protection of the guarantees of freedom of speech and freedom of the press as enunciated in the state constitution and the United States Constitution.[1] The First Amendment protects the right to engage in charitable solicitation,[2] and unlike commercial speech, charity fundraising involves speech that is fully protected by the First Amendment.[3] Indeed, speech that solicits funds is protected by the First Amendment.[4] Professional fundraisers are therefore protected by the First Amendment.[5] The fact that a fundraiser is paid to disseminate information on behalf of charities by which it was hired does not, in itself, render its activity outside the protection of the First Amendment.[6] Also, a statute restricting eligibility criteria for participation of charities in an annual state employee charitable campaign fundraising drive does not violate the charities' First Amendment rights to freedom of speech.[7]

The solicitation of charitable contributions is protected speech, and the state's interest in protecting charities and the public from fraud is a sufficiently substantial interest to justify a narrowly tailored regulation of speech;[8] the First Amendment does not

  

guarantee an organization its preferred method of solicitation.[9] However, because solicitations for charitable contributions are so intertwined with speech that they are entitled to protection under the First Amendment, statutes attempting to restrict such speech must be narrowly tailored to achieve an important governmental interest without unnecessary infringement of First Amendment freedoms.[10] A state's regulation of charitable solicitation practices by professional fundraisers, which defined the reasonableness of fees using percentages of receipts collected, is deemed not narrowly tailored to achieve the state's valid interest in protecting charities, since a charity might choose a particular type of fundraising drive or a particular solicitor expecting to receive a large sum as measured by total dollars rather than a percentage of the dollars remitted, or might choose to engage in the advocacy or dissemination of information during solicitation or to seek the introduction of the charity's officers to the philanthropic community during a special event.[11] Also, an ordinance prohibiting door-to-door or on-street solicitation of contributions by charitable organizations not using at least 75% of their receipts for "charitable purposes" is unconstitutionally overbroad in violation of the First and 14th Amendments.[12]

**Practice Tip:**

Consistent with the First Amendment, states may maintain fraud actions against charitable fundraisers when fundraisers make false or misleading representations designed to deceive donors about how their donations will be used.[13]



Footnotes

1 American Cancer Soc. v. City of Dayton, 160 Ohio St. 114, 51 Ohio Op. 32, 114 N.E.2d 219 (1953).

2 Illinois, ex rel. Madigan v. Telemarketing Associates, Inc., 538 U.S. 600, 123 S. Ct. 1829, 155 L. Ed. 2d 793 (2003); Rodgers v. Bryant, 301 F. Supp. 3d 928 (E.D. Ark. 2017), aff'd, 942 F.3d 451 (8th Cir. 2019); McLaughlin v. City of Lowell, 140 F. Supp. 3d 177 (D. Mass. 2015).

3 Fraternal Order of Police v. Stenehjem, 287 F. Supp. 2d 1023 (D.N.D. 2003), rev'd on other grounds, 431 F.3d 591 (8th Cir. 2005).

4 International Society for Krishna Consciousness of California, Inc. v. City of Los Angeles, 764 F.3d 1044 (9th Cir. 2014); Berger v. City of Seattle, 569 F.3d 1029 (9th Cir. 2009).

5 Riley v. National Federation of the Blind of North Carolina, Inc., 487 U.S. 781, 108 S. Ct. 2667, 101 L. Ed. 2d 669 (1988).

6 Dayton Area Visually Impaired Persons, Inc. v. Fisher, 70 F.3d 1474, 1995 FED App. 0330P (6th Cir. 1995).

7 Independent Charities of America, Inc. v. State of Minn., 82 F.3d 791 (8th Cir. 1996).

8 Riley v. National Federation of the Blind of North Carolina, Inc., 487 U.S. 781, 108 S. Ct. 2667, 101 L. Ed. 2d 669 (1988).

9 International Society for Krishna Consciousness of California, Inc. v. City of Los Angeles, 764 F.3d 1044 (9th Cir. 2014).

10 Dayton Area Visually Impaired Persons, Inc. v. Fisher, 70 F.3d 1474, 1995 FED App. 0330P (6th Cir. 1995).

11 Riley v. National Federation of the Blind of North Carolina, Inc., 487 U.S. 781, 108 S. Ct. 2667, 101 L. Ed. 2d 669 (1988).

12 Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 100 S. Ct. 826, 63 L. Ed. 2d 73 (1980).

13 Illinois, ex rel. Madigan v. Telemarketing Associates, Inc., 538 U.S. 600, 123 S. Ct. 1829, 155 L. Ed. 2d 793 (2003).

End of Document

# 16A Am. Jur. 2d Constitutional Law § 491

**American Jurisprudence, Second Edition** | May 2021 Update

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**IX. Fundamental Constitutional Rights and Privileges**

**C. Particular Fundamental Constitutional Rights**

**1. First Amendment Rights Guaranteed by Constitution**

**c. Freedom of Speech and Press**

**(3) Who is Protected**

**(b) Public Employees**

## § 491. Public employee as having right to freedom of speech and press, generally

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 1555, 1925 to 1963

**A.L.R. Library**

First Amendment protection for law enforcement employees subjected to discharge, transfer, or discipline because of speech, 109 A.L.R. Fed. 9

First Amendment protection for judges or government attorneys subjected to discharge, transfer, or discipline because of speech, 108 A.L.R. Fed. 117

First Amendment protection for public hospital or health employees subjected to discharge, transfer, or discipline because of speech, 107 A.L.R. Fed. 21

First Amendment protection for publicly employed firefighters subjected to discharge, transfer, or discipline because of speech, 106 A.L.R. Fed. 396

  

Dismissal of, or other adverse personnel action relating to, public employee for political patronage reasons as violative of First Amendment, 70 A.L.R. Fed. 371

Speech by citizens on matters of public concern lies at the heart of the First Amendment, and this remains true when the speech concerns information related to or learned through public employment.[1] By accepting public employment, one does not forgo his or her right to freedom of speech.[2] Although the state's interest in regulating the speech of its employees as a class differs significantly from its interest in regulating such activities by the general public, even so a public employee is entitled to First Amendment protections which include the right, within limits, to criticize and to comment upon matters touching the public service in which the employee is engaged.[3]

A state cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression.[4] Public employees do not surrender all their First Amendment rights by reason of their employment; rather, the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern.[5] Matters of public concern that may form the basis for the protected speech of a public employee under the First Amendment are those that can be fairly considered as relating to any matter of political, social, or other concern to the community.[6] However, although a public employee does not relinquish his or her First Amendment rights to comment on matters of public interest by virtue of government employment, these rights are not absolute because government, as an employer, has a legitimate interest in regulating the speech of its employees to promote efficiency of its public services.[7] The First Amendment's protection of an employee's right to speak on matters of public concern extends to independent contractors.[8]

Pursuant to *Pickering*,[9] and its progeny,[10] two inquiries guide the interpretation of the constitutional protections accorded to a public employee's speech: the first requires determining whether the employee spoke as a citizen on a matter of public concern; if not, the employee has no First Amendment cause of action based on the government employer's reaction to the speech, but if the answer is yes, the possibility of a First Amendment claim arises, and the question then becomes whether the government employer has an adequate justification for treating the employee differently from any other member of the general public.[11] In conducting a *Pickering* balance of a public employee's First Amendment rights against a public employer's interest in promoting public efficiency, the courts are to consider whether the speech in question (1) impairs discipline by superiors, (2) impairs harmony among coworkers, (3) has a detrimental impact on close working relationships, (4) impedes the performance of the public employee's duties, (5) interferes with the operation of the agency, (6) undermines the mission of the agency, (7) is communicated to the public or to coworkers in private, (8) conflicts with the responsibilities of the employee within the agency, and (9) makes use of the authority and public accountability which the employee's role entails.[12] By its terms, the *Pickering-Connick* balancing test is only applicable where the employee has been punished after speaking in an ad hoc disciplinary action.[13] A government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations.[14] The First Amendment limits the ability of a public employer to leverage the employment relationship to restrict, incidentally or intentionally, the liberties that employees enjoy in their capacities as private citizens.[15] As long as public employees speak as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively.[16]

When balancing a public employee's interest in commenting on an issue of public concern with a public employer interest in avoiding direct disruption of the public employer's internal operations and employment relationships, the court will not consider the employee's statements in a vacuum; the manner, time, and place of the employee's expression are relevant, as is the context

  

in which the dispute arose.[17] An off-the-clock statement may be viewed as less disruptive to the government employer than one made at the office or during the work day.[18] In determining whether a public employee's speech is entitled to constitutional protection, the fact that the employee expresses his or her views inside his or her office rather than publicly is not dispositive; employees in some cases may receive First Amendment protection for expressions made at work.[19] Indeed, a public employee's speech on a matter of public concern can occur in a private forum.[20] Also, in determining whether a public employee's speech is entitled to constitutional protection, the fact that the speech concerns the subject matter of the employee's employment is nondispositive; the First Amendment protects some expressions related to the speaker's job.[21] When public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.[22] When a public employee speaks as a citizen addressing a matter of public concern, the First Amendment requires a delicate balancing of the competing interests surrounding the speech and its consequences, which degree of scrutiny is absent when the employee is simply performing his or her job duties.[23] Public employers may not restrict employees' free speech rights by creating excessively broad job descriptions; the listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties for First Amendment purposes.[24] There must be a balance between a public employee's First Amendment right to comment on matters of public concern and the state's interest as an employer in promoting the efficiency of the public service it performs, and pursuant to this balancing test, a whistleblower is protected from retaliation if his or her speech interests, together with the public's right to hear the speech, outweigh governmental needs as an employer.[25]

**Observation:**

Although the government employer bears the burden of establishing the potential disruptiveness or the harmful effects of an employee's speech in order to restrict speech on a topic of public concern, it is not required to produce actual evidence of disruption to prevail; substantial weight is given to the government's reasonable predictions of disruption when it acts as an employer so that the government employer does not need to wait for the actual disruption of the office and the destruction of working relationships to manifest before taking action.[26]



Footnotes

1 Lane v. Franks, 573 U.S. 228, 134 S. Ct. 2369, 189 L. Ed. 2d 312 (2014).

2 Beilan v. Board of Public Ed., School Dist. of Philadelphia, 357 U.S. 399, 78 S. Ct. 1317, 2 L. Ed. 2d 1414 (1958).

3 Am. Jur. 2d, Public Officers and Employees § 235.

4 Garcetti v. Ceballos, 547 U.S. 410, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006).

5 Garcetti v. Ceballos, 547 U.S. 410, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006); Curinga v. City of Clairton, 357 F.3d 305 (3d Cir. 2004); Tejada-Batista v. Fuentes-Agostini, 251 F. Supp. 2d 1048 (D.P.R. 2003).

6 Cooper v. Town of Bar Nunn, 257 F. Supp. 2d 1363 (D. Wyo. 2003), judgment aff'd, 101 Fed. Appx. 324 (10th Cir. 2004).

7 Mandell v. County of Suffolk, 316 F.3d 368, 60 Fed. R. Evid. Serv. 400 (2d Cir. 2003).

8 Springer v. Henry, 435 F.3d 268 (3d Cir. 2006).

9 Pickering v. Board of Ed. of Tp. High School Dist. 205, Will County, Illinois, 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968).

10 Connick v. Myers, 461 U.S. 138, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983).

11 Garcetti v. Ceballos, 547 U.S. 410, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006).

12 Calef v. Budden, 361 F. Supp. 2d 493, 197 Ed. Law Rep. 93 (D.S.C. 2005).

13 Firenze v. N.L.R.B., 993 F. Supp. 2d 40 (D. Mass. 2014).
As to claims of retaliation against public employees, see § 493.

14 Garcetti v. Ceballos, 547 U.S. 410, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006).

15 Garcetti v. Ceballos, 547 U.S. 410, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006).

16 Tennessee Secondary School Athletic Ass'n v. Brentwood Academy, 551 U.S. 291, 127 S. Ct. 2489, 168 L. Ed. 2d 166, 220 Ed. Law Rep. 39 (2007); Garcetti v. Ceballos, 547 U.S. 410, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006).

17 Trant v. Oklahoma, 754 F.3d 1158 (10th Cir. 2014).

18 Connick v. Myers, 461 U.S. 138, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983).

19 Garcetti v. Ceballos, 547 U.S. 410, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006).

20 Cooper v. Town of Bar Nunn, 257 F. Supp. 2d 1363 (D. Wyo. 2003), judgment aff'd, 101 Fed. Appx. 324 (10th Cir. 2004).

21 Garcetti v. Ceballos, 547 U.S. 410, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006).

22 Garcetti v. Ceballos, 547 U.S. 410, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006).

23 Garcetti v. Ceballos, 547 U.S. 410, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006).

24 Garcetti v. Ceballos, 547 U.S. 410, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006).

25 Tejada-Batista v. Fuentes-Agostini, 251 F. Supp. 2d 1048 (D.P.R. 2003).

26 Love v. Rehfus, 946 N.E.2d 1 (Ind. 2011); Santer v. Board of Educ. of East Meadow Union Free School Dist., 23 N.Y.3d 251, 990 N.Y.S.2d 442, 13 N.E.3d 1028, 307 Ed. Law Rep. 369 (2014).

**End of Document**

**16A Am. Jur. 2d Constitutional Law § 492**

**American Jurisprudence, Second Edition** | May 2021 Update

**Constitutional Law**

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**IX. Fundamental Constitutional Rights and Privileges**

**C. Particular Fundamental Constitutional Rights**

**1. First Amendment Rights Guaranteed by Constitution**

**c. Freedom of Speech and Press**

**(3) Who is Protected**

**(b) Public Employees**

# § 492. Political patronage or affiliation by public employee as basis of employment or dismissal

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 1925 to 1963

The wholesale practice of dismissing public employees based on their political affiliation, historically characterized by the saying "to the victor goes the spoils," is prohibited under the First and 14th Amendments.[1] A right not to have allegiance to an official or party in power itself is protected under First Amendment, for purposes of a political patronage claim, irrespective of whether an employee is actively affiliated with an opposing candidate or party.[2]

A public employee has a First Amendment right not to be fired for political patronage reasons if political affiliation is not an appropriate requirement for effective performance of the job.[3] However, political party affiliation is an appropriate requirement for certain positions in the government, such as a county's purchasing agent, chief financial officer, and office manager,[4] a staff legal assistant,[5] or an assistant county attorney, and therefore such persons are not entitled to First Amendment protection from politically motivated dismissals.[6]

  

**Observation:**

It is generally accepted by the courts that a good rule to follow for the purpose of determining whether an employee may or may not be fired for political patronage reasons is that the farther removed from the executive, policymaking level an employee is, the less relevant his or her political loyalty becomes.[7]



Footnotes

1 Billingsley v. St. Louis County, 70 F.3d 61 (8th Cir. 1995).

2 Shumek v. McDowell, 743 F. Supp. 2d 472 (M.D. Pa. 2010).

3 Blair v. Meade, 76 F.3d 97, 1996 FED App. 0051P (6th Cir. 1996); Beauregard v. Olson, 84 F.3d 1402 (11th Cir. 1996).

4 Blair v. Meade, 76 F.3d 97, 1996 FED App. 0051P (6th Cir. 1996).

5 Billingsley v. St. Louis County, 70 F.3d 61 (8th Cir. 1995).

6 Gordon v. County of Rockland, 110 F.3d 886 (2d Cir. 1997); Mumford v. Basinski, 105 F.3d 264, 1997 FED App. 0028P (6th Cir. 1997).

7 Blair v. Meade, 76 F.3d 97, 1996 FED App. 0051P (6th Cir. 1996).

**End of Document**

# 16A Am. Jur. 2d Constitutional Law § 493

**American Jurisprudence, Second Edition** | May 2021 Update

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**IX. Fundamental Constitutional Rights and Privileges**

**C. Particular Fundamental Constitutional Rights**

**1. First Amendment Rights Guaranteed by Constitution**

**c. Freedom of Speech and Press**

**(3) Who is Protected**

**(b) Public Employees**

## § 493. Claim of retaliation against political employee exercising freedom of speech

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 1925 to 1963

While the First Amendment invests public employees with certain rights, it does not empower them to constitutionalize the employee grievance.[1] A citizen, upon entering government service, by necessity must accept certain limitations on his or her freedom, and that upon accepting public employment, such employees do not check all of their First Amendment rights at the door.[2] Government employers, like private employers, need a significant degree of control over their employees' words and actions in order that employees not contravene governmental policies or impair the proper performance of governmental functions; when acting as an employer charged with providing such essential services as public safety and education, rather than a sovereign governing its citizens, a governmental entity has greater leeway under the Constitution to control employees speech that threatens to undermine its ability to perform its legitimate functions.[3] At the same time, a citizen who works for the government is nonetheless a citizen and the First Amendment limits the ability of a public employer to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens.[4] While public employees may not constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest, safeguarding such rights does not require public office to be run as roundtable for employee complaints over internal office affairs; therefore, court must strike proper balance between public employee's right to speak on matters of public concern and employer's right to run efficient, functional operations.[5]

  

A First Amendment retaliation claim requires a plaintiff to show: (1) constitutionally protected conduct; (2) an adverse action was taken that would sufficient to deter a person of ordinary firmness from exercising his or her constitutional rights; and (3) a causal link between the constitutionally protected conduct and the retaliatory action.[6] The term "adverse action," refers to any action that would deter a person of ordinary firmness from exercising protected conduct, including harassment or publicizing facts damaging to a person's reputation.[7] A combination of seemingly minor incidents may form the basis of a constitutional First Amendment retaliation claim once they reach a critical mass.[8]

To show that a public employer had an adequate justification for treating an employee differently from any other member of the public based on the government's needs as an employer, for purposes of a First Amendment retaliation claim, the employer has the burden to show that the employee's activity is disruptive to the internal operations of the governmental unit in question; the disruption must be significant enough so that it impairs discipline by superiors or harmony among coworkers, has a detrimental impact on close working relationships, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise.[9] When examining whether a public employee's act of speaking disrupted the workplace, as would weigh against a finding that the government retaliated against the employee for his speech in violation of the First Amendment, the court reviews the manner, time, and place in which the employee's speech took place.[10]

**Observation:**

A public employee asserting First Amendment retaliation carries the burden on the issue of whether his speech was in the course of his duties or as a citizen.[11]

**CUMULATIVE SUPPLEMENT**

**Cases:**

Township police officer's complaints to county assistant district attorney regarding town supervisors' alleged improper and unlawful conduct were made as part of officer's official duties as police officer, and thus were not protected by First Amendment, as would support § 1983 First Amendment retaliation claim arising from officer's termination, even though officer was off-duty when he complained to assistant district attorney; it was within officer's duties as police officer to investigate and report criminal activity. U.S. Const. Amend. 1. Lahovski v. Rush Township, 441 F. Supp. 3d 43 (M.D. Pa. 2020).

**[END OF SUPPLEMENT]**



Footnotes

1 Garcetti v. Ceballos, 547 U.S. 410, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006).

2 Jackler v. Byrne, 658 F.3d 225 (2d Cir. 2011).

3 Jackler v. Byrne, 658 F.3d 225 (2d Cir. 2011).

4 Garcetti v. Ceballos, 547 U.S. 410, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006).

5 Willis v. City of Virginia Beach, 90 F. Supp. 3d 597 (E.D. Va. 2015).

6 Golovan v. University of Delaware, 73 F. Supp. 3d 442, 319 Ed. Law Rep. 163 (D. Del. 2014).

7 Thompson v. Ohio State University, 92 F. Supp. 3d 719, 322 Ed. Law Rep. 203 (S.D. Ohio 2015), judgment aff'd, 639 Fed. Appx. 333 (6th Cir. 2016).

8 Burns v. Department of Public Safety, 973 F. Supp. 2d 141 (D. Conn. 2013).

9 Delano v. City of Buffalo, 45 F. Supp. 3d 297 (W.D. N.Y. 2014), aff'd, 626 Fed. Appx. 23 (2d Cir. 2015).

10 Clairmont v. Sound Mental Health, 632 F.3d 1091 (9th Cir. 2011).

11 Watts v. City of Jackson, 827 F. Supp. 2d 724 (S.D. Miss. 2011).

**End of Document**

# 16A Am. Jur. 2d Constitutional Law § 494

**American Jurisprudence, Second Edition** | May 2021 Update

**Constitutional Law**
Barbara J. Van Arsdale, J.D.; James Buchwalter, J.D; Paul M. Coltoff, J.D.; John A. Gebauer, J.D.; Lonnie E. Griffith, Jr., J.D.; Janice Holben, J.D.; Sonja Larsen, J.D.; Lucas Martin, J.D.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Karl Oakes, J.D.; Karen L. Schultz, J.D.; Jeffrey J. Shampo, J.D.; and Kimberly C. Simmons, J.D.

**IX. Fundamental Constitutional Rights and Privileges**

**C. Particular Fundamental Constitutional Rights**

**1. First Amendment Rights Guaranteed by Constitution**

**c. Freedom of Speech and Press**

**(3) Who is Protected**

**(b) Public Employees**

## § 494. Particular public employee speech as protected by First Amendment

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 1925 to 1963

Consistent with the principles protecting a public employee's First Amendment's right to free speech,[1] the courts have held that—

— a public-sector union speech in collective bargaining, including a speech about wages and benefits, involved matters of great public concern, and was subject to First Amendment protections.[2]

— a public employee's sworn testimony in a judicial proceedings on a matter of public concern is a quintessential example of First Amendment speech as a citizen for a simple reason: anyone who testifies in court bears an obligation, to the court and society at large, to tell the truth.[3]

— sworn testimony by the director of a community college's program for underprivileged youth, at criminal corruption trials of a former program employee who was also state representative, was "citizen speech" eligible for First Amendment protection, not unprotected employee speech, although the director learned of the subject matter of his testimony in the course of his employment with the program; providing sworn testimony was not a part of director's ordinary job responsibilities.[4]

  

— police officers' comments on a social networking web site regarding inexperienced officers receiving promotions spoke on a matter of public concern, and were entitled to First Amendment protection; the fact that the officers used a social networking web site to publicly post comments suggested an intent to communicate to the public or advance a political or social point of view beyond the employment context.[5]

— a police officer was speaking pursuant to his official duties, rather than as a private citizen on a matter of public concern, when he wrote a report documenting an incident in which a fellow officer pointed a gun at his head following an argument about the fellow officer's conduct in the work place.[6]

On the other hand, the courts have held that—

— a deputy district attorney did not speak as a citizen when, pursuant to his official duties as a calendar deputy, he wrote a disposition memorandum in which he recommended dismissal of a pending criminal case on the basis of purported governmental misconduct, and so his speech was not protected by the First Amendment; when he went to work and performed the tasks he was paid to perform, the district attorney acted as a government employee, not as a citizen, and the fact that his duties sometimes required him to speak or write did not prohibit his supervisors from evaluating his performance.[7]

— a police officer's speech was personal, rather than public where the officer wrote a memo and spoke with a supervisor complaining that his partner was lazy and incompetent, that officer was forced to complete duties assigned to the partner, and that another supervisor was too friendly with the partner and unfairly awarded the partner comp time and preferable assignments.[8]

— a state university professor who criticized the misuse of grant funds relating to the project he was in charge of administering was speaking as a faculty employee rather than a private citizen, and his speech was not protected under the First Amendment, since administering the grant as a principal investigator fell within the teaching and service duties the professor was employed to perform.[9]

— a state police lieutenant spoke pursuant to his official duties such that his speech was not protected by the First Amendment when he contended at a police meeting that persons convicted of murder should be granted clemency, in that lieutenants routinely were required to attend meetings and exchange information about investigations, and he was advising his employer about the results of an investigation he had been ordered to conduct as a public employee.[10]

— the *Pickering* balancing test weighed against a terminated state employee, an education department psychologist who had consulted on state disability benefits claims, in his First Amendment retaliation action, which claimed that the termination was the result of his disagreement with the new methods for approving claims for speech and language pathologies, where the employee had been involved in a heated argument ending in the supervisor's ultimatum to the employee, and had written to the management accusing the supervisor of fraud and legal and ethical violations, and the speech in question was more concerned with conflicts over internal procedures than with the public interest.[11]

— a city employee was not acting in his official capacity when he wrote a memorandum on the city letterhead because he did not make the statements pursuant to his official duties as code enforcement officer, building inspector, or plumbing inspector, and although not made pursuant to his official duties, the employee's memorandum was not protected speech under the First Amendment because speech regarding internal office policies, office morale, or confidence in supervisors was not of public concern if it was not related to the performance of job duties, and the questions the employee raised in his memorandum about an investigation were directed less at evaluating the performance of public officials, and more at the employee's disputes with his superiors, and the memorandum did not address a matter of public concern.[12]

  

**CUMULATIVE SUPPLEMENT**

**Cases:**

State employee's anonymous blog post on local website, which copied series of screenshots taken from Maryland Natural Resources Police (MNRP) captain's social networking website page in which he boasted about his gun collection and seemed to make light of gun violence, did not involve matter of public concern, and thus, the post was not protected by First Amendment; although the post showed a lack of sobriety on the topic, it concerned purely personal speech, as nothing in the post conveyed that captain failed to comply with agency protocol for gun safety that he posed any genuine threat to the public safety, or that his conduct might predictably affect the public in some way. U.S. Const. Amend. 1. Carey v. Throwe, 957 F.3d 468 (4th Cir. 2020).

**[END OF SUPPLEMENT]**



Footnotes

1 § 491.

2 Janus v. American Federation of State, County, and Mun. Employees, Council 31, 138 S. Ct. 2448, 201 L. Ed. 2d 924 (2018).

3 Lane v. Franks, 573 U.S. 228, 134 S. Ct. 2369, 189 L. Ed. 2d 312 (2014).

4 Lane v. Franks, 573 U.S. 228, 134 S. Ct. 2369, 189 L. Ed. 2d 312 (2014).

5 Liverman v. City of Petersburg, 844 F.3d 400 (4th Cir. 2016).

6 Gilbert v. City of Chicopee, 915 F.3d 74 (1st Cir. 2019).

7 Garcetti v. Ceballos, 547 U.S. 410, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006).

8 Brownfield v. City of Yakima, 612 F.3d 1140 (9th Cir. 2010).

9 Renken v. Gregory, 541 F.3d 769 (7th Cir. 2008).

10 Callahan v. Fermon, 526 F.3d 1040 (7th Cir. 2008).

11 Bailey v. Department of Elementary and Secondary Educ., 451 F.3d 514 (8th Cir. 2006).
As to the Pickering balancing test, see §§ 491, 492.

12 Quintal v. City of Hallowell, 2008 ME 155, 956 A.2d 88 (Me. 2008).

End of Document

# 16A Am. Jur. 2d Constitutional Law § 495

**American Jurisprudence, Second Edition** | May 2021 Update

**Constitutional Law**
Barbara J. Van Arsdale, J.D.; James Buchwalter, J.D; Paul M. Coltoff, J.D.; John A. Gebauer, J.D.; Lonnie E. Griffith, Jr., J.D.; Janice Holben, J.D.; Sonja Larsen, J.D.; Lucas Martin, J.D.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Karl Oakes, J.D.; Karen L. Schultz, J.D.; Jeffrey J. Shampo, J.D.; and Kimberly C. Simmons, J.D.

**IX. Fundamental Constitutional Rights and Privileges**

**C. Particular Fundamental Constitutional Rights**

**1. First Amendment Rights Guaranteed by Constitution**

**c. Freedom of Speech and Press**

**(3) Who is Protected**

**(c) The Press**

## § 495. Regulation of press, generally; regulation as business; free press as guardian of public interest

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2070 to 2081

The free press is the guardian of the public interest.[1] The First Amendment protects a newspaper itself from claims related to publication decisions and grants it a virtually unfettered right to choose what to print and what not to.[2] The First Amendment does not just protect a news outlet's editorial perspective or the way its beat reporters cover a given campaign or policy initiative; rather, because the integrity of the newsroom does not readily permit mandated interaction with the government, the First Amendment applies in full force to all news, comment, and advertising.[3] The constitutional guarantee of a free press assures the maintenance of the political system and an open society, and secures the paramount public interest in a free flow of information to the people concerning public officials.[4]

However, the press does not possess any immunities not shared by every individual;[5] the publisher of a newspaper has no special privilege to invade the rights and liberties of others, and a publisher must answer for libel and may be punished for contempt of court.[6] Moreover, the press, to the extent that it is a business activity, is not immunized from all regulation to

  

which other business activities are subject.[7] Profit motive is entirely irrelevant to the determination of a news organization's First Amendment rights.[8]

The enforcement of general laws against the press is not, under the First Amendment, subject to stricter scrutiny than would be applied to enforcement against other persons or organizations.[9]

The First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability; otherwise valid laws serving substantial public interests may be enforced against the press as against others, despite the possible burden that may be imposed.[10] Like others, newspaper publishers are subject to the antitrust laws[11] as well as to federal labor laws,[12] and they must pay equitable and nondiscriminatory taxes on their business.[13] However, any state compulsion to publish that which reason tells a newspaper publisher should not be published is unconstitutional.[14]

**Observation:**

A state statute barring the placing of liquor advertisements in newspapers "published by, for or in behalf of any educational institution" is not unconstitutional as imposing a selective tax or other financial burden on newspapers because of their content.[15]



Footnotes

1 Courthouse News Service v. Planet, 947 F.3d 581 (9th Cir. 2020).
Courts have a duty to conduct a thorough and searching review of any attempt to restrict public access to observe government activities; if a government agency restricts public access, the media's only recourse is the court system because the free press is the guardian of the public interest, and the independent judiciary is the guardian of the free press. Leigh v. Salazar, 677 F.3d 892 (9th Cir. 2012).

2 Rall v. Tribune 365, LLC, 43 Cal. App. 5th 638, 256 Cal. Rptr. 3d 775 (2d Dist. 2019), review filed, (Jan. 27, 2020).

3 Washington Post v. McManus, 944 F.3d 506 (4th Cir. 2019).

4 PG Pub. Co. v. Aichele, 705 F.3d 91 (3d Cir. 2013).

5 Shavers v. Duval County, 73 So. 2d 684 (Fla. 1954).
As to regulation of newspapers, magazines and other periodicals, see Am. Jur. 2d, Newspapers, Periodicals, and Press Associations §§ 22, 23
As to nonimmunity of press associations from regulation, see Am. Jur. 2d, Newspapers, Periodicals, and Press Associations § 54.

6 Am. Jur. 2d, Newspapers, Periodicals, and Press Associations § 23.

7 Branzburg v. Hayes, 408 U.S. 665, 92 S. Ct. 2646, 33 L. Ed. 2d 626 (1972).

8 Courthouse News Service v. Planet, 947 F.3d 581 (9th Cir. 2020).

9 Cohen v. Cowles Media Co., 501 U.S. 663, 111 S. Ct. 2513, 115 L. Ed. 2d 586 (1991).

10 Branzburg v. Hayes, 408 U.S. 665, 92 S. Ct. 2646, 33 L. Ed. 2d 626 (1972).

Generally, as to the constitutionality of statutes regulating newspapers, see Am. Jur. 2d, Newspapers, Periodicals, and Press Associations §§ 24 to 29.

11 Am. Jur. 2d, Newspapers, Periodicals, and Press Associations §§ 57 to 77.

12 Am. Jur. 2d, Labor and Labor Relations § 591.

13 Am. Jur. 2d, Newspapers, Periodicals, and Press Associations § 30.

14 Mehdi v. Commission on Human Rights and Opportunities, 144 Conn. App. 861, 74 A.3d 493 (2013).

15 The Pitt News v. Fisher, 215 F.3d 354, 145 Ed. Law Rep. 173 (3d Cir. 2000).

**End of Document**

# 16A Am. Jur. 2d Constitutional Law § 496

**American Jurisprudence, Second Edition** | May 2021 Update

**Constitutional Law**
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**IX. Fundamental Constitutional Rights and Privileges**

**C. Particular Fundamental Constitutional Rights**

**1. First Amendment Rights Guaranteed by Constitution**

**c. Freedom of Speech and Press**

**(3) Who is Protected**

**(c) The Press**

## § 496. Right of press to gather news or information

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 1551, 2070

Although the rights granted to the press and embodied in the First Amendment are not absolute,[1] nevertheless the First Amendment provides at least some protection for news agencies' efforts to gather news,[2] and it protects their right to receive protected speech.[3] However, even the great general interest in an unfettered press may at times be outweighed by other great societal interests,[4] and, therefore, the press is not immune from restrictions or regulations.[5] The right of the press to speak and publish does not carry with it the unrestrained right to gather information.[6]



Footnotes

1 Telemundo of Los Angeles v. City of Los Angeles, 283 F. Supp. 2d 1095 (C.D. Cal. 2003).

2 American Civil Liberties Union of Illinois v. Alvarez, 679 F.3d 583 (7th Cir. 2012).

3 Davis v. East Baton Rouge Parish School Bd., 78 F.3d 920, 107 Ed. Law Rep. 540 (5th Cir. 1996).

4 Briscoe v. Reader's Digest Association, Inc., 4 Cal. 3d 529, 93 Cal. Rptr. 866, 483 P.2d 34, 57 A.L.R.3d 1 (1971) (overruled on other grounds by, Gates v. Discovery Communications, Inc., 34 Cal. 4th 679, 21 Cal. Rptr. 3d 663, 101 P.3d 552 (2004)).

5 As to application to the press of regulations to which other business activities are subject, see § 495.

6 Pell v. Procunier, 417 U.S. 817, 94 S. Ct. 2800, 41 L. Ed. 2d 495 (1974); Branzburg v. Hayes, 408 U.S. 665, 92 S. Ct. 2646, 33 L. Ed. 2d 626 (1972); In re Attorney General's "Directive on Exit Polling: Media and Non-Partisan Public Interest Groups," issued July 18, 2007, 200 N.J. 283, 981 A.2d 64 (2009).

End of Document

# 16A Am. Jur. 2d Constitutional Law § 497

**American Jurisprudence, Second Edition** | May 2021 Update

**Constitutional Law**
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**IX. Fundamental Constitutional Rights and Privileges**

**C. Particular Fundamental Constitutional Rights**

**1. First Amendment Rights Guaranteed by Constitution**

**c. Freedom of Speech and Press**

**(3) Who is Protected**

**(c) The Press**

## § 497. Press access to information

Topic Summary | Correlation Table | References

**West's Key Number Digest**

West's Key Number Digest, Constitutional Law 2077, 2078

**A.L.R. Library**

Propriety and Scope of Protective Order Against Disclosure of Material Already Entered into Evidence in Federal Court Trial, 138 A.L.R. Fed. 153

Right of access to Federal District Court guilty plea proceeding or records pertaining to entry or acceptance of guilty plea in criminal prosecution, 118 A.L.R. Fed. 621

Right of press, in criminal proceeding, to have access to exhibits, transcripts, testimony, and communications not admitted in evidence or made part of public record, 39 A.L.R. Fed. 871

The free press is the guardian of the public interest.[1] The First Amendment right to gather news is not absolute,[2] While news gathering has some First Amendment protection,[3] its protection does not necessarily include a right to access all news-worthy

  

information.[4] The First Amendment does not guarantee to the press a constitutional right of special access to information or places not available to the general public.[5] News people have no constitutional right of access to prisons or their inmates beyond that afforded to the general public.[6] Similarly, with respect to emergency situations, news people have no constitutional right of access to the scenes of crime or disaster when the general public is excluded.[7] Moreover, as a matter of law, the First Amendment right of access to public information does not extend to physical access to a videotape of a sitting United States President's deposition testimony that was offered in a trial in an underlying criminal case where members of the public, including the press, have been given access to information contained in the videotape, and received all of the information to which they are entitled under the First Amendment.[8] Also, the First Amendment rights to freedom of speech and of the press do not create a per se right of access to government property or activities simply because such access might lead to more thorough or better reporting.[9] Likewise, a state statute restricting access to police accident reports is not facially overbroad, in violation of the First Amendment, where there is no threat of prosecution for violation and no restriction of expressive speech.[10]

However, an association of journalists and media professionals stated a First Amendment claim against the President for retaliatory acts that punished free speech by revoking or threatening to revoke members' security clearances where the association alleged that the President only began considering whether to revoke clearances after several members who were former government officials spoke out critically about him, alleging that the President's motivation was to punish officials' past speech and to deter their media speech going forward, resulting in injury to the association's right to receive information.[11]

The First Amendment does not guarantee to the press the right to be "embedded" with military units, that is, the right to travel with those units in combat operations, and to be accommodated and otherwise facilitated by the military in their reporting efforts from the battlefield.[12]

The First Amendment does not permit the press to break and enter an office or dwelling to gather news with impunity, relieve a newspaper reporter of an obligation shared by all citizens to respond to a grand jury subpoena and answer questions relevant to a criminal investigation even though the reporter might be required to reveal a confidential source, permit the press to publish copyrighted materials without obeying the copyright laws, relieve the media of its obligation to obey the National Labor Relations Act and the Fair Labor Standards Act, permit a restraint of trade in violation of the antitrust laws, or relieve the media of an obligation to pay nondiscriminatory taxes.[13]

Where a city was acting in its governmental capacity rather than proprietary capacity with respect to public property in connection with the official ceremony portion of a celebration commemorating the beginning of the Mexican War of Independence against colonial Spain, the city's denial of equal access to a television broadcast corporation to broadcast the ceremony infringes upon the corporation's First Amendment free speech rights where the official ceremony featured city officials, and the city declared the celebration a special event sponsored by the city.[14]



Footnotes

1 Courthouse News Service v. Planet, 947 F.3d 581 (9th Cir. 2020).
Courts have a duty to conduct a thorough and searching review of any attempt to restrict public access to observe government activities; if a government agency restricts public access, the media's only recourse is the court system because the free press is the guardian of the public interest, and the independent judiciary is the guardian of the free press. Leigh v. Salazar, 677 F.3d 892 (9th Cir. 2012).

2 Davis v. East Baton Rouge Parish School Bd., 78 F.3d 920, 107 Ed. Law Rep. 540 (5th Cir. 1996).

3 § 496.

4 Mocek v. City of Albuquerque, 3 F. Supp. 3d 1002 (D.N.M. 2014), aff'd, 813 F.3d 912 (10th Cir. 2015).

5 Houchins v. KQED, Inc., 438 U.S. 1, 98 S. Ct. 2588, 57 L. Ed. 2d 553 (1978); Nixon v. Warner Communications, Inc., 435 U.S. 589, 98 S. Ct. 1306, 55 L. Ed. 2d 570 (1978); Project Veritas v. Ohio Election Commission, 418 F. Supp. 3d 232 (S.D. Ohio 2019); Jenni Rivera Enterprises, LLC v. Latin World Entertainment Holdings, Inc., 36 Cal. App. 5th 766, 249 Cal. Rptr. 3d 122 (2d Dist. 2019).

6 Houchins v. KQED, Inc., 438 U.S. 1, 98 S. Ct. 2588, 57 L. Ed. 2d 553 (1978).

7 Nicholas v. Bratton, 376 F. Supp. 3d 232 (S.D. N.Y. 2019).

8 U.S. v. McDougal, 103 F.3d 651 (8th Cir. 1996).

9 JB Pictures, Inc. v. Department of Defense, 86 F.3d 236 (D.C. Cir. 1996).

10 Amelkin v. McClure, 205 F.3d 293, 2000 FED App. 0066P (6th Cir. 2000).

11 Pen American Center, Inc. v. Trump, 2020 WL 1434573 (S.D. N.Y. 2020).

12 Flynt v. Rumsfeld, 355 F.3d 697 (D.C. Cir. 2004).

13 Cohen v. Cowles Media Co., 501 U.S. 663, 111 S. Ct. 2513, 115 L. Ed. 2d 586 (1991).

14 Telemundo of Los Angeles v. City of Los Angeles, 283 F. Supp. 2d 1095 (C.D. Cal. 2003).

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